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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TIFFANY INDUSTRIES, INC.,
Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether prudential standing requirements preclude judicial enforcement of a treble damage claim brought under 18 U.S.C. § 1964(c) by a public accounting firm against its former client for past due accounting fees, injury to business reputation and legal costs resulting from the discovery and disclosure of a scheme by the client to overstate its financial condition in order to influence potential lenders.

2. Whether a complainant bringing an action under 18 U.S.C. § 1964(c) must allege a distinct racketeering injury as the Second Circuit requires or an injury arising from its ownership, patronage or competition with an infiltrated enterprise as the Seventh Circuit requires in order to demonstrate his entitlement to judicial enforcement of his claim, or whether such allegations are unnecessary as the Eighth Circuit and one panel of the Seventh Circuit hold.

PARTIES TO THE ACTION

Petitioner, defendant below, is Tiffany Industries, Inc., a publicly-held company which manufactures office furniture and exports grain-handling and storage equipment. Petitioner's subsidiaries and affiliates are listed in the Appendix (App. A-46). Farrell Kahn and Gail Martin were also defendants below.

Respondent, plaintiff below, is Alexander Grant & Company, a partnership engaged nationally in public accounting.

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TIFFANY INDUSTRIES, INC.,
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vs.

ALEXANDER GRANT & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Tiffany Industries, Inc. respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered August 22, 1984.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 742 F.2d 408 (8th Cir. 1984) and is reprinted in the Appendix (App. A-1). The Memorandum and Order of the United States District Court for the Eastern District of Missouri, Eastern Division, is reported at 563 F.Supp. 35 (E.D.Mo. 1982), and is reprinted in the Appendix (App. A-13).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on August 22, 1984. Petitions for Rehearing and Suggestions for Rehearing En Banc were denied by the Eighth Circuit on October 31, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-68 is reprinted in the Appendix (App. A-34).

Section 1964(c) of that act provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

STATEMENT OF THE CASE

Alexander Grant & Company (Grant) brought suit against Tiffany Industries, Inc. (Tiffany), and two of its employees in February, 1979, alleging a civil violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c). The RICO claim was predicated on allegations of Tiffany's use of the mail or the telephone to justify accounting entries claimed to be fraudulent. 18 U.S.C. §§ 1341, 1343. The communications, according to the complaint, were part of a scheme to report favorable financial results to potential lenders. A step towards the fulfillment of the scheme involved misrepresentations as to its financial condition made by Tiffany to Grant during Grant's audit of Tiffany's 1977 financial statement. Grant discovered and, later, disclosed the scheme. Grant sought treble damages for past due accounting fees, injury to reputation and legal and other expenses incurred.

On Petitioner's motion, the District Court dismissed the action on December 30, 1982 for failure to allege an injury of the type redressable under RICO. The District Court followed the reasoning of the Seventh Circuit in *Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449 (7th Cir.) *cert. denied,* 459 U.S. 880 (1982), a case described by the District Court as "strikingly similar to the facts in this matter", which held that the objectives and purpose of RICO would not be served by permitting the action. (App. A-14). On August 22, 1984, the District Court's decision was reversed by the Eighth Circuit Court of Appeals which held that Grant had alleged an injury within the meaning of 18 U.S.C. § 1964(c). On October 31, 1984, the Eighth Circuit denied Tiffany's Petition for Rehearing.

The Eighth Circuit's analysis is directly contrary to and specifically rejects the meaning of the Seventh Circuit in *Cenco* that standing under § 1964(c) should be determined in the context of the purposes and objectives of the statute. The Eighth Circuit also rejected the standing requirement adopted by the

Second Circuit in the *Sedima* trilogy which held that a complaint must allege a distinct racketeering injury. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 22, 1984) (No. 84-648); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657); *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984) *petition for cert. filed sub. nom. Joel v. Cirritto*, 53 U.S.L.W. 33431 (U.S. Oct. 15, 1984) (No. 84-604).

REASONS FOR GRANTING WRIT

The prospect of recovering treble damages, in addition to costs and attorneys' fees, under the civil remedy provision of RICO, 18 U.S.C. § 1964(c) has inspired plaintiffs in steadily increasing numbers to include RICO claims in garden variety commercial litigation. Evidence of the growing recognition of RICO as a supplement to or as a surrogate for more familiar statutory or common law remedies is that it has spawned a specialized bar and a specialized publication, the *Racketeering Litigation Reporter.* The burgeoning use of RICO in this context threatens to impose unduly expansive liability and the prospect of duplicative damages on unsuccessful defendants. Plaintiffs, on the other hand, are likely to experience either windfall damage awards or undeserved settlements cudgeled from defendants with legitimate fears of being subjected to a treble damage judgment or the implications of being labeled as racketeers. Understandably, the rampant employment of this treble damage provision has resulted in uncertainty and confusion among trial courts and litigants as to the scope of the remedy. The Circuit Courts of Appeal are in similar turmoil.

The Circuits have rendered inconsistent, sometimes confusing opinions concerning the scope of the cause of action under § 1964(c). The Second, Seventh and Eighth Circuits conflict on this question. At the heart of their conflict is whether concepts of prudential standing should limit the types of claims which may be brought under § 1964(c) or whether the statute should be interpreted literally to allow any claim.

The issue of the scope of the remedy provided by § 1964(c) is ripe for review. Civil RICO claims are being filed with increasing frequency, and the prejudice to litigants from the lack of uniformity in the statute's application promises to continue. A reconciliation among the Circuits is unlikely due to the fundamental differences in the approach each has taken to the issue. The decision of the Eighth Circuit in this case in particularly appropriate for review inasmuch as it specifically

declined to consider Congressional purpose in enacting § 1964(c) in order to determine whether any prudential standing requirements limit the scope of the remedy.

Petitions for writs of certiorari to the Second and Seventh Circuits which raise similar issues regarding standing under § 1964(c) are now pending before the Court. *Joel v. Cirrito, supra,* 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604); *Sedima, S.P.R.L. v. Imrex Company, supra,* 53 U.S.L.W. 3367 (U.S. Oct. 22, 1984) (No. 84-648); *Bankers Trust Co. v. Rhoades, supra,* 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657); *American National Bank and Trust Company of Chicago v. Haroco, Inc.,* No. 83-2529 (7th Cir., Oct. 19, 1984); *petition for cert. filed,* 53 U.S.L.W. 3437 (U.S. Nov. 21, 1984) (No. 84-822). Petitioner is informed that a conference to consider the question of granting or denying the requested writs is scheduled for January 4, 1985.

I. The Second, Seventh, and Eighth Circuits Conflict

The basis of the conflict among the Circuits is their view of the doctrine of prudential standing as applied to § 1964(c). *Associated General Contractors of California v. California State Council of Carpenters,* ____ U.S. ____, 103 S.Ct. 897 (1983); *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 2206 (1975); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827 (1970). While the Eighth Circuit and one panel of the Seventh Circuit hold that they must give effect to the literal language of § 1964(c), the Second Circuit and another panel of the Seventh Circuit have found the statute's terms ambiguous, and they have examined the legislative purposes of RICO in order to interpret it consistent with Congressional intent. *Compare Alexander Grant & Co. v. Tiffany Industries, Inc., supra,* 742 F.2d 408 (8th Cir. 1984) and *American National Bank and Trust Company of Chicago v. Haroco, Inc., supra,* No. 83-2529 (7th Cir., Oct. 19, 1984), *with Cenco, Inc. v. Seidman & Seidman, supra,* 686 F.2d

449 (7th Cir.) and *Sedima, S.P.R.L. v. Imrex Co., supra,* 741 F.2d 482 (2d Cir.).

In *Alexander Grant & Company v. Tiffany Industries, Inc.,* 742 F.2d 408 (8th Cir. 1984), *petition for rehearing en banc denied,* (Oct. 31, 1984), the Eighth Circuit held that Grant had standing to sue Tiffany, its former client, and two of Tiffany's employees under § 1964(c). The Court held that Grant's allegations of past due accounting fees and other damages arising out of a scheme to overstate Tiffany's finanical position for potential lenders constituted an injury redressable under RICO.

In reaching this conclusion, the Eighth Circuit specifically rejected the reasoning of the Seventh Circuit in *Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449 (7th Cir.), *cert. denied,* 459 U.S. 880 (1982). In *Cenco,* the Seventh Circuit affirmed the dismissal of a RICO claim brought against Cenco by its former auditors. On facts similar to those here, the Seventh Circuit determined that the auditors had no standing to sue for damages incurred as a consequence of being the witting or unwitting tool of the criminal enterprise. The Court reasoned that Congress enacted RICO to cope with the criminal infiltration of legitimate businesses. It provided civil remedies under § 1964(c) for injured owners, customers or competitors of a business conducted in violation of the act rather than a remedy for the enterprise's accountants. The Court found that enforcing the auditor's treble damage claim in the circumstances would not serve the compensatory and deterrent objectives of the RICO Act. *Id.* at 457.

The Eighth Circuit rejected the Seventh Circuit's analysis of RICO's purposes and objectives and its resultant prudential standing determination. With apparent disregard for the likely impact of its approach, the Eighth Circuit held that standing should not be determined based on an analysis of RICO's purposes and objectives. Instead, it adopted a literal reading of the statute.

The Eighth Circuit questioned the value of the *Cenco* precedent citing *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984), authored by Judge Posner, who also wrote the *Cenco* opinion. Citing language from the *Sutliff* opinion, the Eighth Circuit suggested that Judge Posner had reconsidered his position on prudential standing taken in *Cenco. Alexander Grant & Co. v. Tiffany Industries, Inc., supra,* 742 F.2d at 412, n.10. Nothing in *Sutliff* supports that suggestion. The *Sutliff* case, in which Judge Posner found it unnecessary to cite or distinguish *Cenco,* involved a suit by the infiltrated enterprise against its former infiltrators. Such a suit of course falls squarely within the standing requirements discussed in *Cenco* and is therefore wholly consistent with it. Judge Posner's reference to the breadth of the remedy provided for by Congress in § 1964(c) concerned the reoccurring question of the presence or absence of evidence of plaintiffs' "organized crime" connections, not the question of standing. *Sutliff, Inc. v. Donovan Companies, Inc., supra,* 727 F.2d at 654. The Eighth Circuit also attempted to distinguish *Cenco* on the basis that Grant's injury was "direct" while Seidman & Seidman's was "indirect," but its attempt was unconvincing because the distinction is not real, but only semantic.

The Eighth Circuit's opinion also conflicts with the prudential standing requirements found by the Second Circuit to apply to § 1964(c) in *Sedima, S.P.R.L. v. Imrex Co., supra,* 741 F.2d 482 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3367 (U.S. Oct. 22, 1984) (No. 84-648).[1] In *Sedima,* after a thorough analysis of RICO's legislative history and the "by reason of" language of the statute, the Second Circuit concluded that Congress did not intend the far-reaching and redundant remedy that a literal reading of § 1964(c)'s language would create. *Id.* at

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[1] The Eighth Circuit declined to rule on the question of the prior criminal conviction requirement adopted by the Second Circuit in *Sedima, supra,* because it was not raised in the trial court. *Alexander Grant & Co. v. Tiffany Industries, Inc., supra,* 742 F.2d at 413, n.11.

482. It therefore determined two prerequisites for standing to sue under § 1964(c): 1) a prior criminal conviction of the defendant for either a violation of the RICO statute or one of the predicate acts listed in 18 U.S.C. § 1961(1); and, 2) an allegation of a "racketeering enterprise injury" apart from the injury from the underlying predicate acts.

The Eighth Circuit found the racketeering enterprise injury requirement inappropriate because of its similarity to the competitive or commercial injury requirement which it previously rejected in *Bennett v. Berg,* 685 F.2d 1053 (8th Cir. 1982), *aff'd in part and rev'd in part,* 710 F.2d 1361 (8th Cir. 1983) (en banc) *cert. denied,* ___ U.S. ____, 104 S.Ct. 527 (1983) and because it was a "slippery concept whose definition has eluded even those courts professing to recognize it" *Alexander Grant & Co. v. Tiffany Industries, Inc., supra,* 742 F.2d at 413.

Despite its criticism of the *Sedima* analysis, the Eighth Circuit employed equally "slippery" concepts in this case by requiring "something more" than mere injury from underlying predicate acts. *Id.* Despite its words, the Eighth Circuit's decision is also inconsistent with the Second Circuit's holding in *Bankers Trust v. Rhoades, supra,* 741 F.2d 511. The Second Circuit there adopted a "distinct RICO injury" standing requirement virtually identical to the racketeering enterprise injury requirement previously rejected by the Eighth Circuit. Although the Eighth Circuit admitted that it applied the "something more" requirement in a far narrower fashion than did the Court in *Bankers Trust,* the conflict between the rationale and results of these decisions is too great to be explained as simply a matter of degree.

Since the decision of the Eighth Circuit in *Alexander Grant* on August 22, 1984, a panel of the Seventh Circuit has issued an opinion on the scope of civil RICO. *American National Bank and Trust Company of Chicago v. Haroco, Inc., supra,* No. 83-2529 (7th Cir. Oct. 19, 1984), *petition for cert. filed,* 53

U.S.L.W. 3437 (U.S. Nov. 21, 1984) (No. 84-822). This opinion specifically rejects the prior criminal conviction and racketeering enterprise injury requirements of *Sedima, supra,* as well as the distinct RICO injury requirement of *Bankers Trust.* Ignoring the language of § 1964(c) which limits suits under it to "any person injured...by reason of a violation of section 1962", the Seventh Circuit held that a plaintiff could sue under civil RICO by merely alleging injury from underlying predicate acts. *American National Bank and Trust Company of Chicago v. Haroco, Inc., supra,* slip op. at 28. Although the Seventh Circuit expressed bewilderment about the Eighth Circuit's position in *Grant* regarding the scope of the remedy under § 1964(c), the adoption of a literal reading of the statute and the rejection of the "by reason of a violation of section 1962" standard places the *Haroco* decision in conflict with the Eighth and Second Circuits. *Id.* at 9, n.6.

Fundamental conflicts exist between three of the Circuits concerning prudential standing under § 1964(c). These conflicts cannot be resolved on factual or procedural grounds. To end the continuing uncertainty resulting from the lack of uniformity among the Circuits in the application of the potent remedy provisions of § 1964, the Court should grant review on the issue of prudential standing to sue under 18 U.S.C. § 1964(c).

II. The Issue Involves The Requisite Public Importance To The Courts and Litigants.

Questions of prudential standing under a statute enacted by Congress are uniquely appropriate for Supreme Court review. Uniformity and consistency, always important attributes in the development of the law, have greater significance where the issue is whether the judiciary ought to enforce a claim or not. Disunity on this threshold matter would result in intolerable forum-shopping and a perception of injustice. Only a ruling from this Court can provide the required uniformity.

The civil remedy available to litigants under § 1964(c) promises to alter the future conduct of commercial litigation in federal courts throughout the country. Indeed, many would argue that it already has. Plaintiffs have already transmogrified everyday disputes over past due accounting fees (*Alexander Grant*), the proper calculation of interest rates (*Haroco*), overstated invoices for parts (*Sedima*), and the terms of sale of a business (*Cirrito*) into treble damage actions which potentially will punish the respective defendants in their pocketbooks and in their reputations on a scale not heretofore allowed.[2] Every case which arguably involves misstatements, concealment or other overreaching is a candidate for enhancement by the inclusion of a RICO claim. While speculation about the future effect of § 1964(c) on the caseload in federal courts is fruitless, one can predict with safety that no counsel for the plaintiff in a commercial dispute arguably within the terms of § 1964(c) could ignore its provisions without running the risk of having his or her professional competence questioned.

The harshness of the remedies provided for in § 1964(c) suggest the public importance of the issue of standing to invoke the remedy. Treble damage provisions are unusual in federal statutes. In those exceptional statutes, such as the Clayton Act, where such provisions are found, this Court, recognizing the potential for abuse as well as the punitive nature of the provisions has assiduously supervised their development and application. The provisions of § 1964(c) require similar attention.

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[2] *Alexander Grant & Company v. Tiffany Industries, Inc., supra,* 742 F.2d 408; *American National Bank & Trust Company of Chicago v. Haroco, Inc., supra,* No. 83-2529 (7th Cir., Oct. 19, 1984); *Sedima, S.P.R.L. v. Imrex Co., supra,* 741 F.2d 482; *Joel v. Cirrito, sub nom. Furman v. Cirritto, supra,* 741 F.2d 524.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1608

ALEXANDER GRANT AND COMPANY,
Appellant,

vs.

TIFFANY INDUSTRIES, INC., Farrell Kahn and Gail Martin,
Appellees.

Submitted Jan. 13, 1984.
Decided Aug. 22, 1984.

Before ROSS, JOHN R. GIBSON and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Alexander Grant and Company, a public accounting firm, appeals the dismissal of its complaint brought against its former client, Tiffany Industries, and certain Tiffany officials and employees under Title IX, the Racketeer Influenced and Corrupt Organizations (RICO) provision of the Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, codified at 18 U.S.C. §§ 1961-1968 (1982). The district court, 563 F.Supp. 35 (E.D.Mo. 1982), relying on the Seventh Circuit's decision in *Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449 (7th Cir.), *cert. denied,* 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982), dismissed the complaint under Fed.R.Civ.P. 12(b)(6) on the ground that Grant lacked standing to sue under RICO's civil remedy provision. It also denied Grant's motion to file an amended complaint. Grant argues on appeal that the district court erred in dismissing its RICO claim and that it abused its discretion in denying Grant's motion to file the amended complaint. We reverse and remand for further proceedings.

Grant was retained by Tiffany from 1970 through May, 1978. In 1979, Grant filed an action under RICO's civil remedy provision, 18 U.S.C. § 1964(c), against Tiffany, its president, Farrell Kahn, and Kahn's secretary Gail Martin. Grant claimed that it was the target of a pervasive scheme of mail and wire fraud designed by the defendants to obtain a favorable audit for the fiscal year 1977. Tiffany allegedly sought the favorable audit to obtain credit on better terms and to mislead its stockholders and the Securities & Exchange Commission into believing that the company was financially healthy.

For purposes of reviewing the district court's dismissal of Grant's complaint under Fed.R.Civ.P. 12(b)(6), we must accept as true all of Grant's material allegations and liberally construe the complaint in its favor. *Loge v. United States,* 662 F.2d 1268, 1270 (8th Cir. 1981), *cert. denied,* 456 U.S. 944, 102 S.Ct. 2009, 72 L.Ed.2d 466 (1982). The first allegation is that Kahn, in an effort to inflate the value of Tiffany inventory, falsely represented to Grant that Steelabrade Corporation, a supplier of products to Tiffany, held $500,000 worth of Tiffany inventory as of March, 1978. Grant requested confirmation of this claim from Steelabrade president James Murphy. Kahn and Martin, knowing Murphy would not comply, instead requested that he compile a schedule of all purchases of Steelabrade products by Tiffany during 1977. The two then attached a copy of Grant's confirmation request to the schedule and fraudulently inserted language above Murphy's signature stating that "[t]his inventory was at our premises at December 31, 1977, and March 1, 1978." These documents were then mailed to Grant.

Grant's second claim of fraud concerns an alleged sale of $3,500,000 worth of Tiffany products to the government of Nigeria. Grant learned through the course of its audit that a substantial portion of the products sold had not yet been purchased by Tiffany. Grant questioned whether Tiffany could, under these circumstances, record in its financial statements the substantial earnings resulting from this sale. In response, Tiffany personnel stated that the sale should be certified because

they had issued purchase orders for the products as of June 30, 1977, and that the products were held by ten suppliers who were simply awaiting further shipping instructions. Grant requested confirmation of this claim from the ten suppliers. Kahn and Martin backdated purchase orders and mailed to Grant forged letters from the suppliers confirming the representations made by Tiffany personnel. Grant, still apprehensive, sought "reconfirmation" of the same information. Kahn and Martin then pressured six suppliers to sign and mail reconfirmation letters back to Grant.

Grant further asserts that Kahn and Martin typed two letters at Tiffany's St. Louis County offices allegedly from Nigerian bank officials. The two letters, one a forgery and the other "on information and belief" a forgery, represented that the two banks had extended $3,500,000 in loan commitments to the Nigerian government to enable it to purchase the Tiffany products. Grant also claims that Tiffany used false information to persuade four independent public accounting firms to certify the Nigerian sale, thereby pressuring Grant to do the same. These certifications were then mailed to Grant. By April, 1978, Grant suspected that it was being defrauded and reported its concerns to the Securities & Exchange Commission as required by SEC regulations.

Grant concludes its complaint with the allegation that Tiffany's actions constitute a substantive RICO violation under 18 U.S.C. § 1962(c).[1] It asserts that mail fraud, 18 U.S.C. § 1341, and wire fraud, *id.* § 1343, are two of the acts included in the

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[1] Section 1962(c) provides that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

definition of "racketeering activity,"[2] that the defendants carried out two or more such acts within a ten-year period, thus establishing a "pattern of racketeering activity,"[3] and that Tiffany is an interstate "enterprise"[4] conducted by defendants through a pattern of racketeering activity. Grant further asserts that it is entitled to civil damages for this violation under 18 U.S.C. § 1964(c).[5]

The district court denied Grant's motion to file an amended complaint. The amended complaint names additional Tiffany officials as defendants and recites the foregoing with far greater specificity and clarity. It also incorporates additional claims of fraud; the original complaint includes 26 acts of mail fraud and 4 acts of wire fraud while the amended complaint reveals 48 and 10 instances, respectively. Included in the amended complaint are the following additional allegations: (1) Tiffany officials were negotiating with seven insurance companies for $9,000,000 in loans when it discovered in June, 1977 that, if generally accepted accounting principles were used, it was operating at a

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[2] "Racketeering activity" is defined as, *inter alia,* "any act which is indictable under any of the following provisions of title 18, United States Code: * * * section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) * * *." 18 U.S.C. § 1961(1)(B).

[3] A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity * * the last of which occurred within ten years * * after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5).

[4] "Enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

[5] 18 U.S.C. § 1964(c) provides a civil remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962 * *."

loss for the year; (2) Tiffany officials forged at least some of the "reconfirmation" letters from those suppliers who either refused or ignored Kahn's request that they assure Grant that they held Tiffany inventory bound for Nigeria; (3) Tiffany officials forged a third letter and a telex from officers of Nigeria banks that confirmed the $3,500,000 loan commitment to the Nigerian government; and (4) Tiffany officials further defrauded Grant by representing that Tiffany "farm stores" held inventory in excess of its actual value. The officials also pressured the managers of these stores to send false certifications to Grant and to make phony offers to purchase their inventories at inflated prices.

Grant asserts the it was damaged in three respects as a result of Tiffany's fraudulent representations. First, it claims that it suffered "theft of services," *i.e.*, the fraud required it to spend substantially more time on the Tiffany audit with a commensurate increase in fees, none of which have been paid. Second, it contends that the SEC investigation caused it to spend large amounts for attorneys' fees, document requests, and other expenses. Third, Grant argues that the fraud caused it to suffer damages to its business reputation.

I. Standing

The district court did not hold, nor does Tiffany argue, that Grant has failed to plead facts sufficiently alleging that Tiffany committed a substantive violation of RICO under section 1962(c).[6] Rather, the district court relied on *Cenco* and its

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[6] *See supra* note 1. We do observe that Grant's original complaint alleges that Tiffany is both a "person" and an "enterprise" within the meaning of section 1962(c). It was precisely because of the possibility of such an identity that we held that count II of the complaint in *Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in part and rev'd in part*, 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, ____ U.S. ____, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983), failed to state a claim. Tiffany does not raise this point on appeal. We note, however, that Grant's amended complaint alleges that, in addition to Tiffany, two other distinct "enterprises" existed. The first consists of an

holding that the accounting firm in that case suffered only "indirect" injury insufficient to grant it standing under section 1964(c).[7] Grant asserts that *Cenco* should not be adopted as the law of this circuit because its restrictive interpretation has no basis in the language or legislative history of RICO. It further argues that, in any event, this case is distinguishable from *Cenco* because Grant has been "directly" injured by Tiffany's fraudulent practices. Tiffany argues that *Cenco* was properly decided and that Grant has suffered the same indirect injury alleged by the accounting firm in that case.[8]

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association in fact of the six named individuals alleged in the amended complaint to have participated in the fraud. The second consists of all Tiffany employees.

[7] *See supra,* note 5. The term "indirect injury" discussed in *Cenco* has also been used as a synonym for the "commercial" or "competitive" injury requirement. *See, e.g., Schacht v. Brown,* 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 509, 78 L.Ed.2d 698 (1983). It has been suggested that this requirement, borrowed from antitrust law, is applicable to RICO because the statute's legislative history reveals that it was "intended in part to combat the threat posed by racketeer influences in the free market system." *Bennett,* 685 F.2d at 1059. We explicitly rejected in *Bennett* any "commercial" or "competitive" injury restriction on standing under RICO. *Id. See also* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L.Rev. 237, 255 n. 52 (1982).

[8] Appellee Kahn argues separately that Grant's injury is insufficient because it was not a victim in the "target area" of the alleged RICO violation. He asserts that this concept, derived from standing tests developed under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), is applicable to RICO plaintiffs. Recognizing that we declined in *Bennett* an invitation to apply antitrust standing restrictions to RICO plaintiffs, *see supra* note 7, Kahn does not argue that Grant satisfies the target area test only if it suffers "commercial" or "competitive" injury. Rather, Kahn asserts that Grant must "loan Tiffany money, buy its stock or otherwise extend economic benefits to [it] * * *" to have standing. Appellee's Brief at 20. We believe that this reasoning is simply an alternative means of characterizing Grant's injury as "indirect," and therefore feel it merits no analysis independent of our discussion of *Cenco.*

We believe that *Cenco* is distinguishable from this case. In *Cenco,* the accounting firm of Seidman & Seidman was a co-defendant with Cenco, Inc., in a class action brought by persons who had purchased Cenco stock at allegedly inflated prices due to the company's fraudulent representations. The co-defendants cross-claimed against each other. Seidman argued that it too had been defrauded by Cenco and sought as damages under RICO indemnification for its liability to the shareholders. In this case, Grant seeks not indemnification but damages for the amount of its lost fees, the amount spent by reason of the SEC investigation, and the amount representing its loss of business reputation. We believe there are direct injuries, distinguishable from a claim for indemnification which, by its very nature, is secondary and indirect.

Second, and more compellingly, we are unpersuaded by the reasoning employed in *Cenco.* Judge Posner, writing for the panel, reasoned that the case was one of first impression and that the "language of section 1964(c) provides no answer * * * and there is no useful legislative history relating to the provision." *Cenco,* 686 F.2d at 457. The opinion thus focused on whether recognizing a cause of action in favor of Seidman would be consistent with the "compensatory and deterrent objectives of RICO" and would comport with its primary purpose of "cop[ing] with the infiltration of legitimate businesses.' " *Id.* (quoting *United States v. Turkette,* 452 U.S. 576, 591, 101 S.Ct. 2524, 2532, 69 L.Ed.2d 246 (1981)). The court concluded that the objectives and purposes of RICO would not be served by permitting such actions, and also expressed concern with the volume of treble damage lawsuits an opposite decision might spawn.[9]

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[9] The particular language in *Cenco* is as follows:

> It is presumably on behalf of the owners, perhaps also the customers and competitors, of such businesses that the civil damages remedy was created, and not on behalf of the people

We cannot agree that Grant's standing under section 1964(c) is to be determined by means of an appeal to RICO's purpose and objectives. Section 1964(c) provides a civil remedy for "[a]ny person injured in his business or property by reason of a violation of section 1962 * * *." This language is unambiguous and, "in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Russello v. United States,* ____ U.S. ____, ____, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983) (quoting *Turkette,* 452 U.S. at 580, 101 S.Ct. at 2527). We find no legislative history supporting the direct-indirect dichotomy; indeed, to the extent that the concept of indirect injury is a surrogate for concerns of federal-state relations and crowded court dockets, the legislative history indicates that Congress recognized that these were necessary costs in the fight against organized crime. *See* Blakey, supra note 7, at 280. It is simply "beyond our authority to restrict the reach of the statute" in this manner. *Bennett v. Berg,* 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd in part and rev'd in part,* 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied,* ____ U.S. ____, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983); *see generally Moss v. Morgan Stanley, Inc.,* 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984); *Schacht v. Brown,* 711 F.2d 1343, 1361 (7th Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 509, 78 L.Ed.2d 698 (1983).

We also observe that Judge Posner, in the post-*Cenco* decision of *Sutliff, Inc. v. Donovan Cos.,* 727 F.2d 648 (7th Cir. 1984), determined the scope of RICO with considerably greater

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> who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO. It is unlikely that Congress if it had adverted to the issue would have chosen to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation, especially when many of these would inevitably be, as here, the witting or unwitting tools of the violator.

686 F.2d at 457.

deference to its plain language than he did in *Cenco.*[10] We believe that *Sutliff* robbed *Cenco* of much of the precedential value accorded it by the district court. Insofar as the approaches in the two cases differ, the task of reconciliation is left to the Seventh Circuit.

We conclude that Grant has suffered injury within the meaning of section 1964(c).

II. Racketeering Enterprise Injury

Section 1964(c) provides that a civil remedy is available to persons suffering injury "by reason of a violation of section 1962 * * *." Yet section 1962(c) does not prohibit "racketeering activity;" rather, it makes it unlawful for a person to "conduct or participate * * * in the conduct of [an] enterprise's affairs through a pattern of racketeering activity * * *." Tiffany reasons that the language of these two sections combines to limit civil recovery to persons suffering a "racketeering enterprise injury"—*the conduct of an enterprise through* a pattern of racketeering—and does not create a cause of action for those suffering injury only from the underlying predicate acts. Tif-

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[10] In *Sutliff,* Judge Posner made the following observation in the context of rejecting an organized crime connection for civil RICO recovery:

> Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes. We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about.

727 F.2d at 654 (citations omitted). *Sutliff* does not refer to the *Cenco* decision.

fany asserts that Grant's injuries have resulted solely from the particular acts of mail and wire fraud outlined in the complaint.

We have characterized the attempt to limit the scope of RICO by seizing on the "by reason of" language contained in section 1964(c) as a "reiterat[ion] in new guise [of] the argument that no [distinct] 'enterprise' is alleged * * *." *Bennett,* 685 F.2d at 1059 n. 5. As advanced by Tiffany here, a racketeering enterprise injury also appears to bear some resemblance to the commercial or competitive injury concept and to the requirement that RICO is applicable to only those defendants associated with organized crime. We rejected both of these restrictions in *Bennett.* 685 F.2d at 1058-59, 1063-64. We recognize that a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it. *See In Re Catanella and E.F. Hutton and Co. Sec. Litigaton,* 583 F.Supp. 1388, 1434-37 (E.D.Pa.1984) (collecting cases). "Underlying this [racketeering enterprise injury] requirement is the familiar judicial discomfort with the potential breadth of RICO's civil component." *Id.* at 1434.

We need not further consider the nature of a racketeering enterprise injury, however, for it is clear that Grant's complaint does not simply allege injury from the underlying predicate acts. It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant's business reputation. We conclude that these allegations sufficiently plead an injury "by reason of" a RICO violation.

The Second Circuit recently held in *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir. 1984), that the "by reason of" language in section 1964(c) requires that the injury result from mobster activity or the efforts of organized crime. As indicated previously, this requirement is contrary to our holding in *Ben-*

nett.[11] We do view our decision today as consistent with the Second Circuit's decision in *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984). Both require that civil RICO plaintiffs allege something more than injury from the underlying predicate acts. We recognize, however, that the Second Circuit in *Bankers Trust* defines that "something more" in a far narrower fashion. *Id.* at 517. *See also Furman v. Cirrito,* 741 F.2d 524 (2d Cir. 1984) (criticizing the requirement of a racketeering enterprise injury imposed by *Sedima* and *Bankers Trust*).

Appellee Kahn asserts in the alternative that no "racketeering enterprise injury" exists because Tiffany never secured the favorable audit from Grant, and therefore its business operations were never enhanced, nor did it receive any financial advantage, from its racketeering activity. We are not persuaded by this argument. As concluded above, Grant's complaint sufficiently alleges that its injury resulted from the operation of Tiffany through a pattern of racketeering activity. Moreover, Kahn's argument would lead to the anomalous result that the racketeering activity must be allowed to proceed to successful completion before civil recovery is permitted. No interpretation of the plain language of RICO's civil provisions supports the position that Grant must silently tolerate the significant costs and risks associated with ongoing fraud before it seeks redress.

III. Amended Complaint

The district court did not articulate its reasons for refusing to allow Grant to file the amended complaint. Two factors convince us that the district court should on remand give serious consideration to Grant's motion. First, any additional allegations contained in the amended complaint would in all

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[11] *Sedima* also holds that a prior criminal conviction is a prerequisite to civil RICO recovery. This issue has not been raised in the district court in this case.

likelihood be permitted in evidence under the original complaint. Second, the amended complaint relates Grant's claim in a far clearer and more specific manner.

In summary, we conclude that Grant has sufficiently pled that it was "injured" by Tiffany's fraudulent practices and that its injury occurred by reason of" Tiffany's alleged violation of section 1962(c).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-191 C (3)

ALEXANDER GRANT & COMPANY,
Plaintiff,

v.

TIFFANY INDUSTRIES, INC., et al.,
Defendants.

MEMORANDUM AND ORDER
(Filed Dec. 30, 1982)

This matter is before the Court on defendants' renewed motions to dismiss. The Court in its order of July 20, 1982, set out a pre-trial procedure which would be followed in this matter. In this initial stage the Court will consider only the legal issue of plaintiff's standing under the civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964. Both sides have briefed this issue extensively for the Court.

Plaintiff is the former independent auditor of defendnat Tiffany Industries. In its complaint plaintiff alleges that defendants committed various fraudulent acts in an attempt to deceive plaintiff as to Tiffany's true financial condition. Plaintiff claims that the resulting deception visited upon it resulted in harm to its reputation and seeks treble damages under RICO. Defendants contend that plaintiff has no standing under RICO to bring this action and cite in support of their argument the Seventh Circuit's recent opinion in *Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449 (7th Cir. 1982). Thus the Court's ruling on defendants' motions turns upon *Cenco's* meaning and applicability to this action.

Cenco was an action involving facts very similar to those in this action. Purchasers of Cenco stock brought a class action against Cenco and its independent auditor Seidman & Seidman alleging that fraudulent practices committed by various defendants artificially inflated the value of Cenco's stock. Seidman & Seidman cross-claimed against Cenco under RICO. The court phrased the issue as a question of "the standing of auditors under the RICO statute...to sue [the audited company] for damages...." 686 F.2d at 451. The court inquired "whether a treble-damages action by auditors of criminal enterprises would contribute to the compensatory and deterrent objectives of RICO." *Id.* at 457. Pursuant to this analysis, the court held that auditors such as Seidman & Seidman have no standing under RICO to sue the audited company. In so doing the court stated:

> [i]t is presumably on behalf of owners, perhaps also the customers and competitors, of such businesses that the civil damages remedy was created, and not on behalf of the people who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO.

Id.

In the matter *sub judice* plaintiff attempts to distinguish *Cenco* by arguing that the auditors there alleged only indirect injury while plaintiff here is alleging a direct injury. Although the matter seems to be largely a question of semantics, the holding of the Seventh Circuit is clear—auditors of companies that have been practicing fraudulent bookkeeping techniques do not have standing under RICO to sue the audited companies. The court ruled as a matter of law that auditors of fraud practicing firms do not suffer the type of injury redressable under RICO.

Plaintiff also contends that *Cenco* is in conflict with a recent Eighth Circuit decision, *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), and that the Eighth Circuit's opinion is controlling here. It is true, of course, that if the Seventh and Eighth Circuits had

issued conflicting rulings of law, this Court would be bound by the Eighth Circuit's edict. This, however, is not the situation here. In *Berg* the Court addressed two arguments raised by appellees there. First, the court resolved the issue of whether plaintiffs in that action were required to plead breach of contract to state a claim under RICO. Second, the court answered appellees' contention that plaintiffs had alleged no "injury to property," which appellees argued was a requirement of RICO. 685 F.2d at 1058. Thus, *Berg* is simply a different case than *Cenco,* which indeed, is strikingly similar to the facts in this matter.

Moreover, *Berg* is distinguishable from *Cenco* on one other ground as well. In *Berg* plaintiffs were customers of defendants and were alleging that the "life-care" they had contracted for at the subject retirement village was endangered by defendants' financial mismanagement. Contrast this with the situations in *Cenco* and here in which plaintiffs are neither "owners... customers [nor] competitors" of the alleged criminal enterprises. *Cenco,* 686 F.2d at 457. Accordingly, the Court does not believe that *Berg* in any way alters the applicability or persuasiveness of *Cenco,* and thus, defendants' motions to dismiss plaintiff's complaint will be granted.

Dismissal of plaintiff's complaint does not, however, bring this entire matter to a close. Several defendants in this action have filed counterclaims against plaintiff, and the question remains whether these are to be dismissed as well. Inasmuch as the counterclaims seem to raise primarily state law issues, the Court is most concerned with whether it has subject matter jurisdiction over the counterclaims. The Court, therefore, will ask the parties to brief the issue of whether dismissal of defendants' counterclaim is appropriate under the circumstances of this action.

In accordance with the foregoing,

IT IS HEREBY ORDERED that defendants' renewed motions to dismiss plaintiff's complaint be and are GRANTED.

IT IS FURTHER ORDERED that plaintiff's complaint be and is DISMISSED without prejudice.

IT IS FURTHER ORDERED that the parties shall within 15 days of the date of this order submit to the Court memoranda on the issue of whether defendants' counterclaim in this action should be dismissed.

Dated this 30th day of December, 1982.

/s/ Edward L. Filippine
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-0191-C(4)

ALEXANDER GRANT & COMPANY, a partnership,
Plaintiff,

vs.

TIFFANY INDUSTRIES, INC., FARRELL KAHN
and GAIL MARTIN,
Defendants.

COMPLAINT

COUNT I

JURISDICTION AND VENUE

1. Jurisdiction of this Court is founded upon the provisions of Chapter 96, U.S. Code, "Racketeer Influenced and Corrupt Organizations", Title 18, U.S. Code, Sections 1961, 1962, 1963 and 1964. Defendants were associated with an enterprise [as defined by 18 U.S.C. 1961 (4)], which enterprise was engaged in interstate or foreign commerce (or affected interstate or foreign commerce). Defendants did unlawfully, willfully, and knowingly conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of "racketeering activity" as defined in 18 U.S.C. 1961, to the damage of plaintiffs as hereinafter alleged.

2. This civil action is brought under 18 U.S.C. 1964(c), which provides that any person injured in his business or property by reason of a violation of 18 U.S.C. 1962 may sue therefor in the U.S. District Court for threefold damages.

3. Venue in this Court is founded upon 18 U.S.C. 1965(a), in that defendants reside in the Eastern District of Missouri, or

may be found in said District, or are transacting business in said District.

4. Plaintiff Alexander Grant & Company (hereinafter "Grant") is a partnership and brings this action in its common name pursuant to Rule 17(b)(1), F.R.C.P. for the purpose of enforcing a substantive right existing under the Constitution or laws of the United States. Grant is a public accounting firm and is engaged in the business of rendering audit and accounting services throughout the United States. In the course of rendering its services, Grant represents numerous publicly held companies which are subject to regulation and supervision by the federal Securities and Exchange Commission ("SEC").

5. Defendant Tiffany Industries, Inc. ("Tiffany") is a corporation having its principal place of business in the Eastern District of Missouri. Tiffany is a publicly held company. Until approximately May 1, 1978, the stock of Tiffany was traded on the American Stock Exchange.

6. Defendant Farrell Kahn ("Kahn") is a resident of St. Louis County, Missouri. At all relevant times herein alleged and until approximately May 1, 1978, Kahn was President and Chief Executive Officer ("CEO") of Tiffany. As CEO of Tiffany, Kahn directed and controlled the business of Tiffany and its operations.

7. Defendant Gail Martin ("Martin") resides in the Eastern District of Missouri. At all relevant times herein alleged, Martin was employed by Tiffany as secretary to defendant Kahn.

8. At all relevant times, the activities of defendants Kahn and Martin, and the activities of all other officers, agents and employees of Tiffany, all as described herein, were performed within their employment capacities with Tiffany and were carried out in behalf of Tiffany.

9. Under the provisions of SEC regulations, public companies, including Tiffany, are required to retain independent

public accountants to audit their books and to certify to their financial statements. SEC regulations further require filings by Tiffany and other public companies of independently audited financial statements, and the SEC and the investing public rely upon the accuracy and reasonableness of said financial statements. For several years prior to 1978 and until approximately May 22, 1978, Grant was retained by Tiffany to render accounting and auditing services. Tiffany's fiscal year ends on December 31. Among the services rendered by Grant to Tiffany was the conduct of annual audits of Tiffany's books and records. The results of audits conducted by Grant were incorporated by Tiffany into its annual reports to stockholders and were also included in reports made by Tiffany to the SEC as required by federal securities laws.

10. Tiffany has, from time to time, borrowed substantial sums from various lenders. Upon information, in July of 1977, Tiffany sought and obtained additional loans upon representations by Tiffany to its lenders that Tiffany's financial position was sound and that Tiffany was enjoying positive earnings and thus was a good credit risk to said lenders.

11. Defendant Tiffany is and was at all relevant times a "person" as defined in 18 U.S.C. Sec. 1961(3). Tiffany sells its products in interstate and foreign commerce. Defendants Kahn and Martin were at all relevant times "persons" employed by Tiffany. Defendants were at all relevant times associated with an "enterprise" as defined in 18 U.S.C. Sec. 1961(3) engaged in or the activities of which affect interstate and foreign commerce, specifically, Tiffany and its business operations and affairs.

12. Sometime prior to June 30, 1977, the exact time presently unknown to plaintiffs, defendant Kahn and other officers and employees of Tiffany devised a scheme or artifice to defraud Grant and others. Defendant Kahn and other officers and employees of Tiffany became aware that Tiffany's actual financial position was unsound and that if "generally accepted ac-

counting principles" ("GAAP") were applied, Tiffany was incurring losses rather than earnings. Tiffany misrepresented its true financial position to its lenders in order to obtain financing. Grant was not retained by Tiffany to conduct "interim" audits on Tiffany's books and records during the year. Accordingly, during the year Tiffany was able to record certain sales (as hereinafter described) and to make other entries to its books during the year without any check by independent auditors. Tiffany "closed" its 1977 books and sought to show earnings for the fiscal year ending December 31, 1977. After adjustments proposed by Tiffany, Defendant Kahn and other officers and employees of Tiffany knew that if the actual financial facts (applying GAAP) concerning its 1977 performance were discovered, Tiffany would have sustained a substantial loss for the year instead of a profitable year as shown on Tiffany's books.

13. Defendants sought to induce Grant into assisting, aiding and abetting Tiffany in making false, misleading and fraudulent financial statements. Defendant Kahn and other officers and employees of Tiffany gave Grant false, misleading and fraudulent information, intending that Grant accept such false, misleading and fraudulent information and permit Tiffany to include such information in Tiffany's financial statements. Defendants further sought to induce Grant to restrict the scope of its audit investigations by complaining that the scope was excessive and by withholding payment of amounts due and theretofore promised to Grant for services performed by Grant during the course of the audit. Defendants further sought to induce Grant to "certify" its audit and financial statements to the SEC and to stockholders, thus lending Grant's reputation and credibility as independent auditors to such false and fraudulent financial statements.

14. Having devised the scheme to defraud as heretofore alleged, defendants conducted or participated, directly or indirectly, in the conduct of Tiffany's affairs through a pattern of

racketeering activity as defined in 18 U.S.C. Sec. 1961(5) in the following particulars:

(a) In late February or early March, 1978, defendant Kahn, in furtherance of said scheme to defraud, called (on the telephone) one Murphy, who is President of Steelabrade Corporation ("Steelabrade"), a supplier of products to Tiffany. Kahn, with full knowledge that as of December 31, 1977 and early March, 1978 Steelabrade held no Tiffany "inventory" in its possession, nevertheless, fraudulently and willfully attempted to induce Murphy to represent to Grant that Steelabrade did, in fact, have in its possession as of December 31, 1977 and early March, 1978 certain inventory purportedly the property of Tiffany. Murphy refused Kahn's fraudulent request, whereupon Kahn directed Murphy to prepare and deliver to Kahn a schedule of all purchases during 1977 of Steelabrade products by Tiffany. Murphy complied.

(b) Kahn falsely and fraudulently represented to Grant that Steelabrade held in its possession (as of December 31, 1977 and early March, 1978) approximately $500,000 in "inventory" (products sold by Steelabrade to Tiffany and other products, all of which were held in Steelabrade's possession). In reliance upon said representations, Grant caused to be sent to Steelabrade a "confirmation" request, that is, a written request that Steelabrade confirm to Grant that Steelabrade did, in fact, have in its possession said inventory. A copy of said confirmation request is attached as Exhibit A and incorporated herein.

(c) On or about March 8, 1978, Kahn and Martin (at Kahn's direction) prepared a schedule showing sales by Steelabrade to Tiffany during 1977 and additional products. The total of said sales and other property was valued at approximately $500,000. To said schedule said defendants attached a confirmation request. Defendant Kahn, or defendant Martin, or some third person (acting at the direction of Kahn or Martin) signed the name "James V. Murphy" (President of Steelabrade) to said document and dated the same. Said signature was made

without the knowledge, consent or authorization of Murphy, and is a forgery. Further, defendant Kahn, or defendant Martin (at Kahn's direction) inserted the following typed language in the confirmation request:

> "Attached please find a list of materials that was either purchased from us going back to 1976 or was delivered to our facility for processing during 1977. This inventory was at our premises at December 31, 1977 and March 1, 1978."

The insertion of said language was done without the knowledge, consent or authorization of Murphy, and is a false statement. A copy of the fictitious and fraudulent confirmation, together with the schedule, is attached as Exhibit B and is incorporated herein.

(d) Defendants committed the acts herein alleged as part of a scheme to defraud Grant, in that Defendants by means of false representations and forgery, intended to induce Grant to believe that Tiffany owned some $500,000 in inventory in the possession of Steelabrade. Defendants further attempted to induce Grant to make a certified audit which would reflect ownership by Tiffany of said inventory. Such certification would have materially increased Tiffany's earnings (or decreased its losses) for 1977, and would have distorted Tiffany's actual financial condition as of December 31, 1977.

(e) On or about March 8, 1978, defendants, having devised and intending to devise a scheme or artifice to defraud (as heretofore alleged) by means of false or fraudulent representations, and for the purpose of executing such scheme or artifice or attempting so to do, placed in a post office or authorized depository for mail, to be sent or delivered by the U. S. Post Office Department, the fictitious, fraudulent and forged confirmation (Exhibit B), addressed to Grant at its offices in Clayton, Missouri. Such actions of defendants are in violation of Title 18, United States Code, Section 1341 (Mail Fraud). Further, such actions constitute a part of a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962.

(f) On or about March 8, 1978, defendants, having devised and intending to devise a scheme or artifice to defraud (as heretofore alleged) by means of false or fraudulent representations, and for the purpose of executing such scheme or artifice or attempting so to do, placed in a post office or authorized depository for mail, to be sent or delivered by the U. S. Post Office Department, a copy of the fictitious, fraudulent and forged confirmation (Exhibit B-1 attached hereto and incorporated herein), addressed to James V. Murphy at Steelabrade at its offices in St. Louis County, Missouri. Such actions of defendants as alleged herein are a separate and additional violation of Title 18, United States Code, Section 1341 (Mail Fraud). Further, such actions constitute a part of a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962.

15. In June, 1977, shortly prior to obtaining loans as described in paragraph 10, Tiffany recorded on its books a purported sale to the Government of Nigeria (hereinafter the "Nigerian sale") in the approximate amount of $3,500,000. The effect of Tiffany's recordation of such purported sale was to increase substantially Tiffany's net income for 1977 (or to decrease losses substantially). The recordation of such sale by Tiffany was effected unilaterally, that is, without audit by Grant.

16. In late December, 1977 when Grant personnel commenced work on the audit of Tiffany's books for 1977, the purported Nigerian sale was brought to Grant's attention. Grant discovered that most of the products allegedly "sold" by Tiffany in 1977 to the Government of Nigeria had not, in fact, been shipped by Tiffany to the Customer. Additionally, Grant's investigation revealed that a substantial portion of the products allegedly "sold" by Tiffany in 1977 were products Tiffany was to purchase from suppliers, and most of said products had not even been purchased by Tiffany for delivery to the Government of Nigeria.

17. As the result of discoveries by Grant as alleged in paragraph 16, serious and substantial questions arose as to

whether, in accord with GAAP, Tiffany had properly recorded the Nigerian sale, and whether Tiffany had the right to reflect in its financial statements the substantial earnings (or reduction in losses) which would result from such a sale. Grant personnel communicated to defendant Kahn and to other Tiffany personnel their serious doubts as to the validity of the purported "sale". Tiffany personnel and representatives of Tiffany aggressively sought to persuade Grant to "sign off" on said sale, that is, to certify that said purported "sale" was indeed a sale in accord with GAAP.

18. Between January and May, 1978, defendants conducted or participated, directly or indirectly, in the conduct of Tiffany's affairs through a pattern of racketeering activities in that they committed acts in violation of 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1343 (wire fraud) as part of a fraudulent scheme or artifice to deceive Grant and to induce Grant to certify the purported Nigerian sale as a sale in accord with generally accepted accounting principles. More specifically:

(a) In early 1978, Tiffany personnel represented to Grant personnel that the Nigerian sale should be recognized as a sale for various reasons, including Tiffany's representation that while the products "sold" had not yet been delivered, nevertheless Tiffany had issued purchase orders in June 1977 (before the Nigerian sale was recorded by Tiffany) to various suppliers, and that the suppliers were "holding" the products as early as June, 1977, awaiting only shipment instructions from Tiffany. Tiffany personnel urged Grant personnel to consider such products as "sold" since Tiffany was obligated to pay the suppliers for such products (by virtue of the purchase orders), and the products were ready for shipment.

(b) In response to the representations by Tiffany as described in subparagraph (a), Grant personnel requested of Tiffany confirmation from each supplier as to the following: (1) the issuance by Tiffany of purchase orders to the various suppliers

prior to June 30, 1977 (the date the Nigerian sale was recorded); (2) the fact that the products so ordered were in fact being held for Tiffany by the suppliers prior to June 30, 1977.

(c) The representations made by Tiffany as described in subparagraph (a) were false and fraudulent and known to be so when made. Tiffany had not, in fact, issued such purchase orders prior to June 30, 1977 as represented, nor were said products being held (per any such purchase orders) by said suppliers awaiting orders for shipment.

(d) Having devised a scheme or artifice to defraud, as heretofore alleged, Tiffany caused to be placed in a post office or authorized depository for mail matter, to be delivered by the U.S. Post Office Department, and thereafter received a letter dated February 20, 1978 from Hunter Manufacturing, Inc. to Tiffany (Exhibit C attached and incorporated herein). Tiffany caused said letter to be mailed and received said letter for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false and fraudulent financial statements which would distort Tiffany's actual earnings or losses. The aforesaid acts by Tiffany are in violation of 18 U.S.C. 1341 (mail fraud) and are part of a pattern of racketeering activity carried out by Tiffany in the conduct of its affairs.

(e) Tiffany committed nine additional and separate violations of 18 U.S.C. 1341 (mail fraud) by causing nine letters to be sent by other suppliers to Tiffany. None of the suppliers, including Hunter Manufacturing, Inc., were aware of Tiffany's true purpose and intent. As to each such letter, Grant restates the allegations contained in subparagraph (d) hereof. Each such violation constitutes part of a pattern of racketeering activity by Tiffany in the conduct of its affairs. Said letters are marked Exhibits D, E, F, G, H, I, J, K and L, and are further described as follows:

Exhibit D: Letter of Merritt Roaster Corp. dated 2/2/78 to Tiffany

Exhibit E: Letter to Hagan Manufacturing Company dated 2/17/78 to Tiffany

Exhibit F: Letter of the Essmueller Company dated 2/21/78 to Tiffany

Exbibit G: Letter of Seedburo International Equipment Co. dated 2/21/78 to Tiffany

Exhibit H: Letter of Ferrell-Ross dated 2/20/78 to Tiffany

Exhibit I: Letter of Gustafson, Incorporated dated 2/17/78

Exhibit J: Letter of Universal Industries dated 2/17/78

Exhibit K: Letter of Howe Richardson Scale Company dated 2/20/78 to Tiffany

Exhibit L: Letter of Superior Equipment Manufacturing Co. dated 2/21/78 to Tiffany

(f) Copies of the ten letters (Exhibits C through L) were delivered by Tiffany employees to Grant personnel in early 1978. Grant personnel advised Tiffany that Grant wished to "reconfirm" the representations of the suppliers by having Tiffany address an additional letter to some of the suppliers. Grant wished to ask a representative group of the suppliers whether the purported Purchase Order to each supplier was, indeed, received by the supplier prior to June 30, 1977, and whether the material supposedly ordered by the Purchase Order had, indeed, been held for Tiffany's account and continued to be so held. A draft of such a confirmation letter was prepared. On or about March 13, 1978, Defendant Kahn, knowing that the representations in said letter (if signed and returned by the suppliers) were false, and intending to defraud and mislead Grant,

caused six (6) letters (Exhibits M through R attached and incorporated herein) to suppliers to be typed on Tiffany letterhead. Defendant Kahn and other Tiffany personnel acting on behalf of Tiffany, having devised a scheme or artifice to defraud, caused to be placed in a post office or authorized depository for mail matter, to be delivered by the U.S. Post Office Department, said six letters (Exhibits M through R). Each such letter contained false and fraudulant statements, and said letters were placed in the mail, addressed to the suppliers as addressees, with the intent by Tiffany to induce each addressee to sign such letter and return the same to Grant and thus to aid and assist Tiffany in defrauding Grant. Tiffany caused said letters to be mailed for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false, fraudulent and misleading financial statements which would distort Tiffany's actual earnings or losses.

(g) Each of the six mailings (Exhibits M through R) wherein Tiffany caused a confirmation to be mailed, is a separate and additional violation of 18 USC 1341 (mail fraud) and each such violation is a part of a pattern of racketeering activity carried out by Tiffany in the conduct of its affairs.

(h) Upon information and belief, Grant alleges that after the six letters (Exhibits M through R) described in sub-paragraphs (f) and (g) were received by the various suppliers, one or more of said suppliers communicated to Tiffany a refusal or reluctance to sign and return the confirmation letter, since at least portions of the statements each supplier was asked to "confirm" was false. At various times (the specific instances presently unknown to Grant) officers and employees of Tiffany, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, transmitted or caused to be transmitted by means of wire (telephone) in interstate commerce messages regarding said letters (Exhibits M

through R) and fraudulent requests that one or more of said suppliers sign and return said confirmations. Each such telephone or other wire communication is a separate violation of 18 USC 1343 (wire fraud).

(i) Having devised a scheme or artifice to defraud (as heretofore described), and for the purpose of executing such scheme or artifice, officers and agents of Tiffany induced the suppliers identified in Exhibits M to R to sign said letters and further caused said letters to be addressed to Grant and to be placed in a post office or authorized depository or mail matter, to be delivered by the U.S. Post Office Department. Each of the six instances aforesaid, wherein Tiffany caused said letters to be mailed to Grant, is a separate and additional violation of 18 U.S.C. 1341 (mail fraud) and each such violation is a part of a pattern of racketeering activity carried out by Tiffany in the conduct of its affairs. Tiffany caused said confirmations to be mailed to Grant for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false and fraudulent financial statements which would distort Tiffany's actual earnings and losses.

(j) In early 1978, questions were raised by Grant as to whether the Government of Nigeria (the alleged purchaser, sometimes referred to as the "Bendel Food Production Board") had made arrangements so as to provide Tiffany sufficient assurance that amounts due Tiffany under the purported Nigerian sale would be paid. Defendant Kahn and other Tiffany officers and employees represented to Grant that "financing" had been arranged, and that a consortium of banks in Nigeria had made commitments to loan the Purchaser sufficient funds to make full payment to Tiffany for products sold under the Nigerian sale. As purported proof of said financing commitments, defendant Kahn, acting in behalf of defendant Tiffany, delivered to Grant the following documents (marked as follows and incorporated herein):

Exhibit S: Letter dated 3/9/78 to Tiffany, from W. J. Anukpe, Chairman/Managing Director, New Nigeria Bank Ltd. (the "Anukpe letter").

Exhibit T: Letter dated 3/20/78 to Tiffany, from M. Insole, Principal Manager, Standard Bank Nigeria Limited (the "Insole letter").

Defendant Kahn represented to Grant that Exhibits S and T had been received by Tiffany from the Nigerian banks designated in said exhibits, and further represented that by virtue of said letters and other assurances given Kahn by the banks and by the Purchaser, payment in full under the Nigerian sale was assured.

(k) The representations made by defendant Kahn and by other Tiffany employees as described in subparagraph (j) were false and fraudulent and known to be so when made:

(1) The Anukpe letter, Exh. S, is a forgery, the purported signature having been forged by defendant Kahn or some other Tiffany officer or employee acting in Tiffany's behalf.

(2) The Anukpe letter, Exh. S, although represented as having been typed and prepared in Nigeria, was in fact typed at Tiffany's offices in St. Louis County, Missouri by defendant Martin or some other Tiffany officer or employee acting in Tiffany's behalf.

(3) The Insole letter, Exh. T, although represented as having been typed and prepared in Nigeria, was in fact typed at Tiffany's offices on the same Tiffany typewriter used to type the forged Anukpe letter.

(4) Upon information and belief, Grant alleges that the Insole letter is a forgery.

(l) Upon information and belief, Grant further alleges:

(1) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or

others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, placed (or caused to be placed) in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Post Office Department, one or both of the fictitious, spurious and fraudulent documents (Exhs. S and T); in violation of 18 U.S.C. 1341 (mail fraud).

(2) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, transmitted or caused to be transmitted by means of wire (telephone) and by telex in interstate or foreign commerce the contents or substance of the contents of Exhs. S and T, in violation of 18 U.S.C. 1943 (wire fraud).

(m) In a false and fraudulent attempt to "pressure" Grant into certifying the Nigerian sale as a sale, Tiffany engaged the services of four independent public accounting firms and furnished to said firms the fictitious, spurious and fraudulent documents (Exhs. S and T) and other false, misleading and fraudulent materials. Tiffany intended, by such fraudulent actions, to persuade said accounting firms to render opinions to the effect that the Nigerian sale should be recognized, and thus to coerce Grant to render such opinion. Based upon the false representations made to said firms, they did indeed render such opinions. Upon information and belief, Grant further alleges:

(1) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore alleged), and for

the purpose of executing such scheme or artifice, placed or caused to be placed in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Post Office Department, and transmitted by wire or telex in interstate or foreign commerce, false and fraudulent communications to said accounting firms and to others, in violation of 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1943 (wire fraud).

19. Throughout the course of the audit by Grant of Tiffany's books and records for 1977, Tiffany officers, agents and employees (or others acting in Tiffany's behalf) impeded and obstructed the ordinary course of the audit and engaged in a conspiracy to conceal relevant facts from Grant and to defraud and mislead Grant. As the result of such conspiratorial and fraudulent conduct, the time required by Grant personnel to conduct the audit was substantially enlarged over the time which would have been required had Tiffany not engaged in such conduct. Tiffany was well aware that the charges by Grant to Tiffany for audit services would be based upon the time spent by Grant personnel. In further perpetration of this fraudulent and criminal conspiracy, Tiffany attempted to induce Grant to complete its audit and certify Tiffany's fraudulent transactions first by withholding payment; then, when the fraudulent and criminal conduct was disclosed, Tiffany sought to conceal said conduct by promising to pay Grant in full.

20. Had Grant been aware of the activities of defendants as above alleged, it would not have performed any accounting services for Tiffany in connection with the 1977 audit. As a result of the fraudulent conduct of defendants as described above, none of which was known or disclosed to Grant, the personnel of Grant continued to perform accounting services for defendant, all to Grant's injury to its business and property.

21. Through late April, 1978, defendants attempted to conceal (and are continuing to conceal) their fraudulent and unlawful acts. In late April, 1978 when Grant confirmed that

defendants had used forged and fictitious documents in an attempt to defraud Grant and in a further attempt to publish misleading and fraudulent financial reports, Grant promptly advised Tiffany and its counsel that Grant would report its findings to the SEC as required by SEC Regulations. Following said report, the SEC commenced an intensive investigation of Tiffany; said investigation is still pending. Following Grant's report to the SEC, Tiffany terminated Grant and refused to pay Grant for its services.

22. As the result of the SEC investigation, which was necessitated by and resulted directly from the unlawful and fraudulent actions of defendants, Grant has incurred substantial expense in responding to SEC subpoenas and requests for documents, interviews, the giving of testimony, counsel fees related to same, and other related expenses.

23. As a further result of the unlawful and fraudulent actions of defendants and their continued effort to conceal such actions, Grant has been damaged in its reputation as a national independent public accounting firm. Defendant Tiffany has issued misleading public statements to the effect that Tiffany's problems do not involve violations of law but instead are little more than "disputes" with its former auditors (Grant).

24. In furtherance of its fraudulent and unlawful actions, Tiffany (beginning in early May, 1978) promised to pay Grant all fees owed (totaling $258,000), whereas Tiffany intended not to pay Grant at all, but to induce Grant to limit its responses to the SEC and to lend its reputation to representations made to the SEC by Defendants.

25. As the result of the foregoing, Grant has been damaged in the sum of $1,500,000.

WHEREFORE, plaintiffs (Grant) prays judgment against defendants under Count I in the sum of $1,500,000; further, in accord with 18 U.S.C. 1964(c), that said award of damages be

trebled, and that plaintiffs further recover the costs of this action and reasonable attorney's fees.

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and

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APPENDIX D

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

18 U.S.C. §§1961-1968

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor

organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the fellonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or policial subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involed in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter.

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his

immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdic-

tion to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities

of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

§1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it has shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigation demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproducing; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violations.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such persons, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as a racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof

made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such

person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(b) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter each order or orders as may be required to carry into effect the provisions of this section.

APPENDIX E

Petitioner's Subsidiary and Affiliated Companies

Tiffany Industries, Inc. is the parent company of the following wholly-owned subsidiary corporations:

Centralia Container Corp., d/b/a "Concen Corp."

Modulo 3 Inc.

Tiffany Industries Americus Corp.

Tiffany Industries Americas, S.A., Inc.
(a wholly-owned subsidiary of Tiffany Americus Corp.)

Tiffany Industries Americas, C.A., Inc.
(a wholly-owned subsidiary of Tiffany Americus Corp.)

Tiffany Industries Americus, Ltd.
(a wholly-owned subsidiary of Tiffany Industries Americas, C.A., Inc.)

TRULOCK Machinery Fair, Inc.

TRULOCK Southern, Inc.

Vuetech Corp.

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No. 84-1084
No. 84-1222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TIFFANY INDUSTRIES, INC.,
Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
Respondent.

FARRELL KAHN,
Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a matter of law, an accountant cannot sue its former client under RICO when the client has conducted the affairs of an enterprise through "organized criminal activity" (a pattern of mail and wire fraud) and the accountant is injured by reason of that conduct.

2. Whether an accounting firm can claim as RICO injuries unpaid fees, additional time spent on an engagement, expenses of an SEC investigation, and loss of business reputation caused by its former client's conduct of the affairs of an enterprise through a pattern of mail fraud and wire fraud aimed at obtaining the accounting firm's unqualified audit opinion on the client's fraudulent financial statements.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Alexander Grant & Company, hereby opposes the writs of certiorari requested by petitioners Tiffany Industries, Inc. and Farrell Kahn. Respondent hereby files this Brief as its opposition to both Petition No. 84-1084 and Petition No. 84-1222.

STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals held that respondent (plaintiff below) Alexander Grant & Company ("Alexander Grant") had alleged an injury within the meaning of 18 U.S.C. §1964(c) by reason of the RICO violations of its former client, petitioner Tiffany Industries, Inc. ("Tiffany"), Tiffany's president, petitioner Farrell Kahn ("Kahn"), and one of Tiffany's employees. The District Court, after limiting the issue to standing, had dismissed the complaint, holding that Alexander Grant lacked standing to sue under RICO. At the same time it dismissed the complaint, the District Court denied (without explanation) Alexander Grant's motion for leave to file its amended complaint.[1] In reaching its decision reversing the lower court, the Eighth Circuit considered and referred to the allegations of both the complaint and of that proposed amended complaint, and held that Alexander Grant had RICO standing and had alleged more than mere injury from the RICO predicate acts. The Court neither explicitly adopted nor explicitly rejected the requirement of a specialized "racketeering enterprise injury", but instead found that if such an injury were required, it had been properly alleged. Thus, the Eighth Circuit holding conflicts with neither the holding of the Seventh Circuit nor that of the Scond Circuit. The Eighth Circuit denied rehearing *en banc,* and denied motions to stay its mandate; the case is proceeding below.

STATEMENT OF THE FACTS

Alexander Grant & Company ("Alexander Grant") is an accounting partnership with offices and partners nationwide. From 1970 until mid-1978 Alexander Grant was the outside auditor for Tiffany Industries, Inc. ("Tiffany"), a publicly

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[1] The proposed First Amended Complaint clarified the allegations, added additional predicate acts and defendants, and brought the "enterprise" allegations into conformity with Eighth Circuit law. That proposed amended complaint appears in the Appendix hereto.

traded company. In 1978, during the course of the audit of Tiffany's financial statements for the fiscal year ended December 31, 1977, Alexander Grant discovered that it was the target of a massive criminal scheme on behalf of Tiffany and certain of its officers, directors, and employees. The purpose of the fraudulent plan, as alleged in the complaint and proposed amended complaint, was to obtain Alexander Grant's unqualified audit opinion on Tiffany's fraudulent financial statements, and thereby conceal Tiffany's true financial condition.

Tiffany and its top officers engaged in almost countless acts of racketeering activity. In order to deceive Alexander Grant, forgery became standard practice. When a document was needed to justify a transaction (*e.g.*, the recording of a sale and earnings from the sale) and the document did not exist, Tiffany's officers or employees simply created it, for example, by cutting genuine letterheads and signatures off of genuine letters, affixing them to blank paper and typing in the desired text. Photocopies of those creations were then presented to Alexander Grant, purporting to be "evidential" matter. The original complaint alleged thirty acts of mail or wire fraud, and the amended complaint alleged 58 such acts, which numbers do not include the multiple acts of mail fraud committed through mass mailings to shareholders and others.

The complaints allege multiple schemes within the major scheme—forged and false letters from equipment suppliers and from Nigerian banks were mailed to convince Alexander Grant to accept recognition of revenue from a sale to a Nigerian state government, inventory values were inflated, forged and false letters of intent to purchase assets were mailed—all for the purpose of convincing Alexander Grant to lend its name and reputation to Tiffany's inflated financials.

The scheme ultimately failed. After months of audit work Alexander Grant discovered and disclosed the fraud. By that time Alexander Grant had expended great amounts of time and

professional labor on the audit—yet it was never paid for its services. The fraud induced Alexander Grant to remain on the engagement much longer than it otherwise would have, and its name was associated with Tiffany, damaging its reputation in the business community. Even after Alexander Grant's discovery and disclosure of the fraud the scheme continued, through promises, later broken, of a full investigation and disclosure of the results, and promises, later broken, of payment for services rendered. The continued fraud increased Alexander Grant's damages, through expenses of an SEC investigation and further injury to its business and professional reputation. Ultimately Tiffany fired Alexander Grant, but never paid the owed accounting fees. This lawsuit, along with others involving Tiffany's shareholders, lenders and insurers, ensued. Tiffany and several of its top officers and directors were sued by the SEC, and signed consent decrees. The private litigation was consolidated, and is now in the course of discovery below. This lawsuit has been severed from that consolidation, but a motion to reconsolidate it (filed after the Eighth Circuit refused to stay its mandate) is pending.

REASONS THE WRIT SHOULD BE DENIED

This case presents a unique factual situation because here the RICO predicate acts (the mail and wire fraud) were directed not at shareholders or competitors of a company, but at its auditors. Its decision by this Court would add little, if anything, to RICO jurisprudence. The decision of the Eighth Circuit, when viewed in light of the facts actually before that court, reveals no conflict between the Circuits. This Court has recently granted certiorari in cases from the Seventh and Second Circuits, and this Court's decision on those cases should resolve any existing conflicts. Ironically, however, the main issue presented by this case is consistent with *both* of those conflicting cases' treatment of the issue.

I. The Decision Of The Eighth Circuit In This Case Does Not Conflict With Either The Second Or The Seventh Circuit Cases.

The unique factual context of this case makes it inappropriate for a grant of certiorari. The clear conflict between the Seventh and Second Circuits on whether a "racketeering enterprise injury" must be alleged has no effect on this case. The Eighth Circuit decision essentially held that *even if* a racketeering enterprise injury is required (as held by the Second Circuit, but not the Seventh), it has been alleged here. Although it is not clear whether the Eighth Circuit requires a racketeering injury, the issue of that requirement will be decided by this Court in its review of *American National Bank & Trust Company of Chicago v. Haroco, Inc.*, 747 F.2d 384 (7th Cir. 1984) *cert. granted* 105 S.Ct. 902 (1985), and *Sedima S.P.R.L. v. Imrex Company, Inc.*, 741 F.2d 482 (2nd Cir. 1984), *cert. granted* 105 S.Ct. 901 (1985).

In *Haroco* the Seventh Circuit held that no specialized "racketeering enterprise injury" distinct from an injury arising from predicate acts is required under RICO. In *Sedima* the Se-

cond Circuit held that such an injury is required.[2] If this Court follows *Haroco,* and finds no racketeering enterprise injury is required, then certainly Alexander Grant has stated a claim, and the Eighth Circuit decision will stand. If, on the other hand, this Court follows *Sedima,* and requires a racketeering enterprise injury, then the case should stand because the Eighth Circuit found that such an injury has been alleged.

The Eighth Circuit, in the case below, characterized the racketeering enterprise injury requirement as "a slippery concept whose definition has eluded even those courts professing to recognize it." *Alexander Grant & Company v. Tiffany Industries, Inc.,* 742 F.2d 408, 413 (8th Cir. 1984), *reh'g en banc denied* (October 31, 1984). The Court then went on to hold, however:

> We need not further consider the nature of a racketeering enterprise injury, however, for *it is clear that Grant's complaint does not simply allege injury from the underlying predicate acts.* It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant's business reputation. We conclude that these allegations sufficiently plead an injury "by reason of" a RICO violation.

Id. (emphasis added). Thus, the Eighth Circuit neither explicitly accepted nor explicitly rejected the racketeering enterprise injury requirement.

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[2] *Sedima's* second holding, that a RICO defendant must have prior RICO or predicate act convictions was specifically *not* decided by the Eighth Circuit. *See* 742 F.2d at 413, n.11.

Although the Eighth Circuit's opinion stated that it read *Sedima* as requiring an injury somehow resulting from "mobster activity," *Sedima's* discussion of racketeering enterprise injury focused on the "by reason of" language in 18 U.S.C. §1964(c). As shown by the quotation above, the same provision was the Eighth Circuit's focus. The *Sedima* opinion also discussed the organized-crime-fighting purposes of RICO, yet the facts before the Eighth Circuit clearly revealed massive, organized criminal activity. We certainly do not read Sedima to require that the defendants be members of the "Mafia" or of some organized crime "family" for RICO to apply. The Eighth Circuit specifically held that its decision was consistent with the Second Circuit's holding in *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2nd Cir. 1984) *petition for certiorari filed* No. 84-657 (Oct. 24, 1984). As the Eighth Circuit stated, "Both require that civil RICO plaintiffs allege something more than injury from the underlying predicate acts." 742 F.2d at 413. Here Alexander Grant has not alleged that it was injured merely by the underlying predicate acts of mail fraud and wire fraud, but rather that it was injured by the conduct of the enterprise's affairs *through* that pattern of mail fraud and wire fraud. The injury was not simply that Alexander Grant relied on a forged document and therefore lost money (*i.e.,* an injury resulting from the predicate act of mail fraud). Rather, as *Sedima* and *Bankers Trust* require and as the Eighth Circuit found, the injury resulted from the *conduct* of the enterprise's affairs, made possible by multiple acts of mail and wire fraud.

Tiffany's Petition for Certiorari claims that a conflict exists between the Seventh Circuit and the Eighth because of the holding by a Seventh Circuit panel in *Cenco, Inc. v. Seidman & Seidman,* 606 F.2d 449 (7th Cir.) *cert. denied* 459 U.S. 880 (1982), that RICO was not intended to provide a remedy to an accountant injured by its client's perpetration of a fraud on shareholders. Petitioner Kahn also claims a conflict with *Cenco,* but he relies on *Cenco's* language that a person used as a "tool" to forward a fraudulent scheme cannot recover under RICO,

and on *Cenco's* requirement of a "direct" injury. Neither Tiffany's nor Kahn's position describes a true conflict between the circuits. When *Cenco* is read in the light of later Seventh Circuit case law, most notably the *Sutliff* opinion (discussed *infra*) and the *Haroco* opinion it is clear that this case does not conflict with the Seventh Circuit law. First, Alexander Grant's complaint (and its proposed amended complaint) does not allege that Alexander Grant was merely a "tool" in the RICO scheme. Alexander Grant was the direct object of the scheme alleged here and was the party directly injured by the RICO violation. In *Cenco* the RICO violations were alleged to be directed at *outsiders,* and the injury alleged by the auditors was the amount the auditors paid in settlement to those outsiders, the shareholders who were directly injured by the pattern of securities fraud. Here the acts of mail and wire fraud (the predicate acts) consisted of mailing forgeries and false documents *to Alexander Grant,* to induce *Alexander Grant* to rely on the fraudulent documents. Alexander Grant's claimed injury is not some amount it paid to others who were directly injured, rather, it is the direct injury it suffered as a result of petitioners' RICO violation. Thus the *Cenco* "direct injury" test is met in this case, and the injuries suffered by the auditors are clearly distinguishable. A later opinion by the author of the *Cenco* opinion, Judge Posner, in *Sutliff Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984), clarified this distinction by granting RICO standing to a plaintiff who was an "*allegedly intended victim* of the scheme", 727 F.2d at 654 (emphasis added) even though that victim had been "infiltrated ... and used ... as a tool to defraud." *Id.* at 653. Clearly the Eighth Circuit in this case was correct when it held that: "... *Sutliff* robbed *Cenco* of much of the precedential value accorded it by the district court." 742 F.2d at 412. Most importantly, no conflict exists with respect to *Haroco,* which is the law of the Seventh Circuit[3].

[3] Tiffany's petition attempts to characterize the *Haroco* opinion as that of a panel of the Seventh Circuit, with no more precedential value than the *Cenco* panel. However, the *Haroco* opinion was circulated to the entire Seventh Circuit en banc, who declined to rehear it.

Petitioner Kahn also argues that the Eighth Circuit decision somehow conflicts with this Court's decision in *United States v. Turkette,* 452 U.S. 576 (1981), because there is no allegation that defendants gained any money from the scheme. (This is a reincarnation of an argument rejected below, that no RICO violation could have occurred because Alexander Grant discovered and disclosed the fraud prior to issuing a favorable audit opinion). Tiffany, however, continued in existence and continued to obtain Alexander Grant's professional services (for which it never paid), petitioner Kahn remained as its President for months longer than he should have, and these very real tangible benefits are certainly as sufficient as any "infusion of income" seen in other cases. Most importantly, the RICO provision under which the suit was brought, §1962(c), refers to the "conduct" of an enterprise's affairs, not to "investing income" or "acquiring an interest" in an enterprise, as do the other RICO sections. Nothing in *Turkette* indicates that a §1962(c) RICO violation may only apply to wholly successful criminal schemes. Surely where a scheme is successfully intercepted and aborted before its ultimate goal is reached, the intended victim who has already suffered losses is an intended RICO plaintiff.

Finally, nothing in the Eighth Circuit decision conflicts with any "prudential standing limitation" requirements of this Court or any other Circuit. Both Petitioners Kahn and Tiffany argue that "standing" analysis was misapplied, but both cite to federal cases where no express private civil remedy was involved, or to antitrust cases which are based on the economic-impact purposes of those specialized statutes. Clearly, where the question is one of a citizen's or taxpayer's right to sue as a "private attorney general" in the absence of a statute, the analysis is different. Here, however, we have an express civil remedy, and the Eighth Circuit's analysis of "standing" does not conflict with any other circuit. Rather, the Eighth Circuit expressly followed the directives of this Court, stating:

> Section 1964(c) provides a civil remedy for "[a]ny person injured in his business or property by reason of a violation

> of section 1962 * * *." This language is unambiguous and, "in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' "

742 F.2d at 412 (quoting *Russello v. United States,* 104 S.Ct. 296 (1983), quoting *Turkette*). The Eighth Circuit found that Alexander Grant properly alleged that its injury resulted "by reason of" petitioner Tiffany's and petitioner Kahn's RICO violations, and held that the statute required no more. The Eighth Circuit's decision is entirely consistent with *Turkette* as well as the standing analysis set forth by this Court in other cases.

II. This Case Presents No Issues Of Public Importance Which Will Not Be Decided In Other Pending Cases.

Both Tiffany's and Kahn's petitions contain lengthy indictments of the civil RICO statute and issue pleas for judicial limitation of the statute. The petitions' "parades of horrors", however, provide no basis for limiting an express legislative remedy. If such limitations are needed, they are for Congress to make. As this Court stated in *Turkette:*

> Congress was well aware that it was entering a new domian of federal involvement through the enactment of this measure. . . . There is no argument that congress acted beyond its power in doing so. That being the case, *the courts are without authority to restrict the application of the statute.*

452 U.S. at 587 (emphasis added).

In any event, this Court, in deciding *Sedima* and *Haroco,* will have ample opportunity to resolve any conflict among the circuits as to the breadth and scope of civil RICO. Because this case can stand under either of those interpretations there is no reason to grant the petitions for certiorari. For the same reasons, the case should not be held pending the decision in

those cases. The Eighth Circuit wisely refused to stay the issuance of its mandate in this case, and as a result the case is proceeding in the district court below. Currently there are seven other lawsuits pending which arose out of the same facts as this case. Discovery in those cases is going forward, and a denial of certiorari in this case would allow this case to be reconsolidated with those and the cases to be readied for trial. This was the first filed in all those lawsuits, and should be the first among them to reach trial.

CONCLUSION

For the reasons stated above, respondent urges this Court to deny the petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-191-C(3)

Alexander Grant & Company,
a partnership,
Plaintiff,

vs.

Tiffany Industries, Inc.,
Gail Martin, Farrell Kahn,
Abraham Appel, Joseph Simpkins,
Frank J. Leber, and Harriet
Cassel, a/k/a Esther Cassel,
Defendant.

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

Count I

Comes now Alexander Grant & Company and for Count I of its claim against defendants states:

A. Jurisdiction and Venue

1. Jurisdiction of this Court is founded upon the provisions of Chapter 96, U.S. Code, "Racketeer Influenced and Corrupt Organizations", Title 18 U.S.C. §§ 1961, 1962, 1963 and 1964.

2. This civil action is brought under 18 U.S.C. § 1964(c), which provides that any person injured in his business or property by reason of a violation of 18 U.S.C. § 1962 may sue in the U.S. District Court for threefold damages.

3. Venue in this Court is founded upon 18 U.S.C. § 1965(a), in that defendants reside in the Eastern District of Missouri, or may be found in said District, or are transacting business in said District.

B. The Parties.

4. Plaintiff Alexander Grant & Company (hereinafter "Grant") is a partnership and brings this action in its common name pursuant to Rule 17(b)(1), F.R.C.P., for the purpose of enforcing a substantive right existing under the laws of the United States. Grant is a public accounting firm engaged in the business of rendering audit and accounting services throughout the United States. In the course of rendering its services, Grant represents numerous publicly held companies subject to regulation and supervision by the federal Securities and Exchange Commission ("SEC").

5. Defendant Tiffany Industries, Inc. ("Tiffany") is a corporation having its principal place of business in the Eastern District of Missouri. Tiffany is a publicly held company. Until approximately May 1, 1978, the stock of Tiffany was traded on the American Stock Exchange.

6. Defendant Farrell Kahn ("Kahn") is a resident of St. Louis County, Missouri. At all relevant times herein alleged, and until approximately May 1, 1978, Kahn was President and Chief Executive Officer ("CEO") of Tiffany and was a shareholder of Tiffany. As CEO of Tiffany, Kahn directed and controlled the business of Tiffany and its operations.

7. Defendant Joseph Simpkins ("Simpkins") resides in the Eastern District of Missouri. Simpkins is the father-in-law of defendant Kahn. At all relevant times herein alleged, Simpkins was the Chairman of the Board of Directors of Tiffany, directed and controlled the business of Tiffany and its operations, and was (and is) the beneficial owner of approximately 34% of the common stock of Tiffany. Simpkins claims to be "the

motivating force" behind Tiffany and claims that he and Tiffany are "viewed as one and the same" by the public and the business community.

8. Defendant Abraham Appel ("Appel") resides in the Eastern District of Missouri. At all relevant times herein alleged, and until approximately January, 1979, Appel was a Director and Vice-President and Chief Financial Officer of Tiffany. Prior to approximately May 10, 1978 Appel was a member of the Audit Committee of Tiffany's Board of Directors.

9. Defendant Frank J. Leber ("Leber") resides in the Eastern District of Missouri. At all relevant times herein alleged, Leber was a Vice-President of Tiffany.

10. Defendant Gail Martin ("Martin") resides in the Eastern District of Missouri. At all relevant times herein alleged, Martin was employed by Tiffany as a secretary to defendant Kahn.

11. Defendant Harriet Cassel, a/k/a Esther Cassel ("Cassel") resides in the Eastern District of Missouri. At all times relevant herein alleged, Cassel was employed by Tiffany as a secretary.

12. At all relevant times, defendants Simpkins, Appel, Leber, Kahn, Martin and Cassel, and all other officers, agents and employees of Tiffany, all as described herein, performed the activities alleged herein within their employment capacities with Tiffany and acted on behalf of Tiffany.

C. Substantive Allegations.

13. Defendants Tiffany, Simpkins, Kahn, Appel, Leber, Martin and Cassel were at all relevant times "persons" as defined in 18 U.S.C. § 1961(3).

14. At all relevant times herein there existed three distinct "enterprises," as defined in 18 U.S.C. § 1961(4), which enterprises were engaged in or the activities of which affected interstate or foreign commerce. These enterprises were:

(a) Tiffany Industries, Inc., a legal corporate entity, which sold its products in both interstate and foreign commerce.

(b) A group of individuals associated with Tiffany Industries Inc., who were associated in fact for the common purpose of defrauding and deceiving Grant. This enterprise possessed continuity of structure and personnel and an ascertainable structure distinct from the pattern of racketeering activity in which it engaged. The activities of this enterprise affected interstate commerce in various ways alleged hereafter, including, but not limited to, attempts to influence or deceive suppliers and customers of Tiffany who were located in various states and engaged in interstate commerce.

(c) A group of individuals consisting of all the employees of Tiffany Industries, Inc. These individuals were associated in fact for the common purpose of doing interstate and foreign business including, but not limited to, sales of agricultural equipment and systems.

All acts alleged hereafter to violate 18 U.S.C. § 1962(c) involved association with, the conduct of and the participation in the affairs of all of the above-described enterprises.

15. Defendants were at all relevant times associated with the above described enterprises and their business operations and affairs. Defendants did unlawfully, willfully and knowingly conduct and participate, directly and indirectly, in the conduct of those enterprises' affairs through a pattern of racketeering activity as defined in 18 U.S.C. § 1961(5), in violation of 18 U.S.C. § 1962(c), to the damage of Grant as hereafter alleged.

16. SEC regulations require public companies, including Tiffany, to retain independent public accountants to audit their books and to certify to their financial statements. SEC regulations further require filings by Tiffany and other public companies of independently audited financial statements, and the SEC and the investing public sometimes rely upon the accuracy

and reasonableness of said financial statements. For several years prior to 1978 and until approximately May 22, 1978, Tiffany retained Grant to render accounting and auditing services. Tiffany's fiscal year ends on December 31. Grant's services rendered to Tiffany included annual audits of Tiffany's books and records. The results of audits conducted by Grant were incorporated by Tiffany into its annual reports to stockholders. These reports were disseminated to Tiffany's lenders and were also filed with the SEC as required by Federal securities laws.

17. Sometime prior to June 20, 1977, the exact time presently unknown to plaintiffs, defendants Simpkins, Kahn, Appel, Leber and other officers and employees of Tiffany became aware that Tiffany's actual financial position was unsound and that if "generally accepted accounting principles" ("GAAP") were applied, Tiffany was incurring losses rather than earnings. Defendants sought to conceal this fiscal instability from Tiffany's shareholders, creditors and the investing public, and sought to present a false picture of financial soundness to those persons. Pursuant to this desire to present a false picture of financial soundness, defendants devised a scheme or artifice to defraud Grant and, pursuant to that scheme or artifice to defraud Grant, committed the acts constituting the violations of 18 U.S.C. § 1962(c) hereafter alleged, which violations were intended to injure and did injure Grant as set forth hereafter. Defendants sought to defraud Grant by deceiving Grant into approving financial statements which were false, misleading and fraudulent and thus to use Grant to create an image of financial stability and profitability. Grant was thus the direct and specific object of defendants' violations of 18 U.S.C. § 1962.

18. Tiffany misrepresented its true financial position to its lenders in order to obtain financing. Tiffany did not retain Grant to conduct interim audits or reviews of Tiffany's books and records during the year. Accordingly, during the fiscal year ended December 31, 1977, Tiffany was able to record certain sales (as hereinafter described) and to make other entries to its

books without any check by independent auditors. Tiffany "closed" its 1977 books and sought to show earnings for the fiscal year ending December 31, 1977. After adjustments proposed by Tiffany, defendants Kahn, Simpkins, Appel, Leber and other officers and employees of Tiffany knew that if the actual financial facts (applying GAAP) concerning its 1977 performance were discovered, Tiffany would have sustained a substantial loss for the year instead of a profit as shown on Tiffany's books.

19. Pursuant to the scheme or artifice to deceive Grant into approving false, misleading and fraudulent financial statements, defendants Kahn, Appel, Leber and other officers and employees of Tiffany knowingly gave Grant false, misleading and fraudulent material information, intending that Grant accept such information as valid and accurate so that it would be restated in Tiffany's financial statements. Defendant Simpkins withheld material financial information from Grant, and upon information and belief, knew that other officers and employees of Tiffany were giving material false information to Grant. Defendants further sought to deceive Grant into restricting the scope of its audit investigations by complaining that the scope was excessive and by withholding payment of fees for services due and theretofore promised to Grant for services performed by Grant during the course of the audit. Defendants further sought to induce Grant to "certify" its audit and financial statements to the SEC and to stockholders, thus lending Grant's reputation and credibility as independent auditors to such false and fraudulent financial statements.

(i) The Nigerian Transactions.

20. In June, 1977 Tiffany recorded on its books a purported sale to the Government of Nigeria (hereinafter the "Nigerian sale") in the approximate amount of $3,500,000. The effect of Tiffany's recording the purported sale was to increase substantially Tiffany's net income for 1977 (or to decrease losses

substantially). The recording of such sale by Tiffany was effected unilaterally, that is, without audit by Grant.

21. In late December, 1977 when Grant personnel commenced work on the audit of Tiffany's books for 1977, the purported Nigerian sale was brought to Grant's attention. Grant discovered that most of the products allegedly "sold" by Tiffany in 1977 to the Government of Nigeria had not, in fact, been shipped by Tiffany to the customer. Additionally, Grant's investigation revealed that a substantial portion of the products allegedly "sold" by Tiffany in 1977 were products Tiffany was to purchase from suppliers, and most of those products had not even been purchased by Tiffany for delivery to the Government of Nigeria.

22. As the result of discoveries by Grant as alleged in paragraph 19, serious and substantial questions arose as to whether, in accord with GAAP, Tiffany had properly recorded the Nigerian sale, and whether Tiffany had the right to reflect in its financial statements the substantial earnings (or reduction in losses) which would result from such a sale. Grant personnel communicated to defendant Kahn and to other Tiffany personnel their serious doubts as to the validity of the purported "sale". Tiffany personnel and representatives of Tiffany aggressively sought to persuade Grant to "sign off" on said sale, that is, to certify that said purported "sale" was indeed a sale in accord with GAAP.

23. Between January and May, 1978, defendants conducted or participated, directly or indirectly, in the conduct of the enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), in that they committed acts violating 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud) as part of a fraudulent scheme or artifice to deceive Grant and to induce Grant to certify the purported Nigerian sale as a sale in accord with GAAP. More specifically:

(a) In early 1978, Tiffany personnel, including but not limited to Kahn and Leber, represented to Grant personnel that the

Nigerian sale should be recognized as a sale for various reasons, including Tiffany's representation that while the products "sold" had not yet been delivered, nevertheless Tiffany had issued purchase orders in June 1977 (before the Nigerian sale was recorded by Tiffany) to various suppliers, and that the suppliers were "holding" the products prior to June 30, 1977, awaiting only shipment instructions from Tiffany. Tiffany personnel urged Grant personnel to consider such products as "sold" under GAAP and pursuant to Tiffany's "revenue recognition program", since Tiffany was allegedly obbligated to pay the suppliers for such products (by virtue of the purchase orders), and the products were allegedly ready for shipment.

(b) In response to the representations by Tiffany as described in subparagraph (a), Grant personnel requested of Tiffany confirmation from each supplier as to the following: (1) that Tiffany had in fact issued the purchase orders to the various suppliers prior to June 30, 1977 (the date as of which the Nigerian sale was recorded); (2) that the suppliers in fact had been holding the products so ordered for Tiffany prior to June 30, 1977.

(c) The representations made by Tiffany and Tiffany personnel as described in subparagraph (a) were false and fraudulent and known to be so when made. Tiffany had not, in fact, issued such purchase orders prior to June 30, 1977 as represented, nor were said products being held (per any such purchase orders) by said suppliers awaiting orders for shipment.

(d) Upon information and belief, Defendant Simpkins knew that Kahn and Leber, or other Tiffany employees or officers, were providing false and misleading information to Grant in an effort to deceive Grant into agreeing that the Nigerian sale should be recognized in 1977.

(e) In response to Grant's requests for supplier confirmations as descried in suparagraph (b) above, and in furtherance of the scheme or artifice to defraud Grant as described above, Tiffany,

Kahn, Leber, Martin, or Cassel, or other Tiffany officers or employees working at their direction, concocted a plan to provide confirmations by fraudulent means or to manufacture the confirmations themselves. Pursuant to that plan, said defendants backdated purchase order forms to show order dates of early June 1977, mailed these purchase orders to the suppliers and asked that they falsely confirm that they had received the purchase orders prior to June 30, 1977 and had been holding the equipment since some time shortly after receipt of the order, awaiting only shipping instructions from Tiffany. If the suppliers refused or failed to falsely confirm as requested, Kahn, Leber, Martin and Cassel, or any of them, or other Tiffany officers or employees working at their direction, forged confirmation letters from the suppliers. These forged letters and the genuine letters solicited by Kahn and Leber, all of which contained false information, were provided to Grant by Tiffany or Kahn in an attempt fraudulently to induce Grant to recognize the revenue as described above.

(f) After being provided with those false confirmations, Grant personnel advised Tiffany that Grant sought to "reconfirm" the representations by having Tiffany address an additional letter to some of the suppliers. Grant sought to ask a representative group of suppliers whether the purported Purchase Order to each supplier was, indeed, received by the supplier prior to June 30, 1977, and whether the material supposedly ordered by the Purchase Order had, indeed, been held for Tiffany's account and continued to be so held. A draft of such a confirmation letter was prepared and on or about March 13, 1978, Defendant Kahn had those letters typed on Tiffany letterhead and mailed to six of the suppliers. All of these actions were taken for the purpose of executing a scheme to defraud Grant and to induce Grant to "sign off" on the Nigerian sale, that is, to certify the sale as a sale and to aid Tiffany in issuing false, fraudulent and misleading financial statements which would distort Tiffany's actual earnings or losses.

24. In the course of executing the above transactions as to seventeen different suppliers, Tiffany, Kahn, Leber, Martin and Cassel, or one or more of them, or other Tiffany officers or employees acting at their direction committed at least 37 acts of mail fraud and 5 acts of wire fraud, as those offenses are defined by 18 U.S.C. §§ 1341 and 1343. The specific violations are described in full in subparagraphs (a) through (q) below. Each of those mail fraud and wire fraud violations was a part of a pattern of racketeering activity (as defined in 18 U.S.C. § 1961(5)) carried out by Tiffany, Kahn, Leber, Martin and Cassel, or any one or more of them, in the conduct of the enterprises' affairs in violation of 18 U.S.C. § 1962(c). Upon information and belief, Simpkins, with knowledge of the fraud, failed to disclose to Grant that the other defendants were providing false and misleading information to Grant pursuant to the scheme or artifice to defraud Grant, and so aided and abetted the other defendants in their violation of 18 U.S.C. § 1962(c). The violations of 18 U.S.C. § 1962(c) described below were directed at Grant and done for the purpose of injuring Grant, by attempting to induce Grant to approve recognition of the income from the transaction.

(a) **The Essmueller Co. ("Essmueller").** Tiffany presented to Grant two letters (Exhibits A and B) confirming receipt of three purchase orders (Tiffany Purchase Orders Numbered 431 (Exhibit C), 485 (Exhibit D), and 494 (Exhibit E)). The two letters were forgeries and falsely confirmed that Essmueller had received the purchase orders dated June 7 and 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase orders. In fact, none of the purchase orders had been received by Essmueller prior to June 30, 1977: one of the purchase orders (No. 431, Exhibit C) was not received until December of 1977, and the other two purchase orders (No. 485 (Exhibit D) and No. 494 (Exhibit E)) were never received by Essmueller. Furthermore Essmueller, in response to a Tiffany request for confirmation of receipt of purchase order

No. 431, was induced to mail a letter (Exhibit F), signed by Ed Bennett, to Tiffany. Kahn, Martin, Cassel or someone acting at Kahn's direction used the letterhead and signature from that genuine letter (Exhibit F), to create the forged letters (Exhibits A and B).

(b) **Burdick Aeration & Electronics Corporation ("Burdick").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's office in St. Louis, Missouri, the Burdick Aeration & Electronics Corporation in Decatur, Illinois, and requested that Burdick confirm that Purchase Order No. 432 (Exhibit G) had been received prior to June 30, 1977, and that Burdick had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase order. In fact, purchase order No. 432 had not been received by Burdick prior to June 30, 1977, and was not received until on or about December 12, 1977. In response to Leber's telephone request, Lynda Johnson ("Johnson"), a Burdick employee, mailed a letter (Exhibit H) to Tiffany, providing the false confirmation. Tiffany presented that letter to Grant, falsely representing that the statements therein were truthful. On or about March 13, 1978, in response to Grant's request for "reconfirmation", Kahn, or someone acting at his direction, mailed a letter to Burdick asking for reconfirmation of the above-described false statements. On March 15, 1978, Johnson was induced to sign the Kahn letter (Exhibit I), again falsely confirming the misrepresentations. Burdick then mailed the letter to Tiffany or to Grant.

(c) **Hunter Mfg. Co. ("Hunter").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, the Hunter Mfg. Co. in Mackinaw, Illinois, and requested that Hunter confirm that Tiffany Purchase Orders Numbered 433 (Exhibit J), 441 (Exhibit K), 442 (Exhibit L), 443 (Exhibit M), and 448 (Exhibit N) had been received prior to June 30, 1977,

and that Hunter had been holding the equipment, awaiting shipping instructions, since shortly after receipt of the purchase orders. In fact, none of the above-described purchase orders was received by Hunter prior to June 30, 1977: they were apparently received in December of 1977. In response to Leber's telephone request, William E. Hunter, a Hunter officer and employee, was induced to mail two letters (Exhibits O and P) to Tiffany providing the false confirmations. Tiffany presented those letters to Grant, falsely representing that the statements therein were truthful. On or about March 13, 1978, in response to Grant's request for "reconfirmation", Kahn, or someone acting at his direction, mailed a letter to Hunter asking for reconfirmation of the above-described false statements (Exhibit Q). On or about March 14, 1978, William E. Hunter was induced to sign the Kahn letter (Exhibit Q) again falsely confirming the misrepresentations. Hunter then mailed the letter to Tiffany or to Grant.

(d) **Universal Industries ("Universal").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, Universal Industries in Waterloo, Iowa, and requested that Universal confirm that Tiffany Purchase Orders No. 434 (Exhibit R), 484 (Exhibit S), 488 (Exhibit T) and 491 (Exhibit U) had been received by Universal prior to June 30, 1977, and that Universal had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase orders. In fact, none of these purchase orders was received by Universal prior to June 30, 1977: Purchase Order No. 434 was not received until on or about December 7, 1977, and Purchase orders Numbered 484, 488 and 491 were not received by Universal until on or about March 13, 1978. In response to Leber's telephone request, Norman E. Armstrong ("Armstrong"), a Universal employee, was induced to mail two letters (Exhibits V and W) to Tiffany, providing the false confirmation. Tiffany presented those letters to Grant, falsely representing that the statements

therein were truthful. On or about March 13, 1978, in response to Grant's request for "reconfirmation", Kahn, or someone acting at his direction, mailed a letter to Universal asking for reconfirmation of the above-described false statements. On or about March 22, 1978, Armstrong was induced to sign the Kahn letter (Exhibit X) again falsely confirming the misrepresentations. Armstrong then mailed the letter to Tiffany or to Grant.

(e) **Garner Mfg. Co. ("Garner").** Tiffany presented to Grant a letter (Exhibit Y) confirming receipt of Tiffany Purchase Order Number 435 (Exhibit Z). The letter was a forgery and falsely confirmed that Garner Mfg. Co. had received Purchase Order No. 435 dated June 10, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, Purchase Order No. 435 (Exhibit Z) did not exist prior to June 30, 1977, and was not received by Garner until December of 1977. Kahn, Cassel or Martin, or someone acting at Kahn's direction, forged the letter (Exhibit Y), purportedly from Philip Mullin of Garner and presented it to Grant.

(f) **Energy Mfg. Co., Inc. ("Energy").** Tiffany presented to Grant a letter (Exhibit 2A) confirming receipt of Tiffany Purchase Order No. 436 (Exhibit 2B). The letter was a forgery and falsely confirmed that Energy and received the purchase order dated June 10, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, Purchase Order No. 436 (Exhibit 2B) did not exist prior to June 30, 1977, and was not received by Energy until December of 1977. Furthermore Energy, in response to Tiffany's request for confirmation of Purchase Order No. 436, was induced to mail a letter (Exhibit 2C) signed by Sandy McQuillen to Tiffany. Kahn, Cassel or Martin, or someone acting at Kahn's direction, used the letterhead and signature from that genuine letter (Exhibit 2C), to create the forged letter (Exhibit 2A).

(g) **Forsbergs International Sales Corp. ("Forsbergs").** Tiffany presented to Grant a letter (Exhibit 2D) confirming receipt of Tiffany Purchase Order No. 437 (Exhibit 2E). The letter was a forgery and falsely confirmed that Forsbergs had received Purchase Order No. 437 dated June 10, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, Purchase Order No. 437 (Exhibit 2D) did not exist prior to June 30, 1977, and was not received by Forsbergs until Decemer of 1977. Furthermore, Forsbergs, in response to a Tiffany request for confirmation of Purchase Order No. 437, was induced to mail a letter (Exhibit 2F), signed by Harry M. Donarski to Tiffany. Kahn, Martin or Cassel, or someone acting at Kahn's direction, used the letterhead and signature from that genuine letter (Exhibit 2F), to create the forged letter (Exhibit 2D).

(h) **CEA Carter International, Inc. ("Carter").** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, CEA Carter International, Inc. in N.E. Minneapolis, Minnesota, and requested that Carter confirm that Purchase Order No. 438 (Exhibit 2G) had been received prior to June 30, 1977 and that Carter had been holding the equipment since shortly after receipt of the purchase order. In fact, Purchase Order No. 438 did not exist prior to June 30, 1977, and was not received by Carter until on or about December 7, 1977. In response to Leber's telephone request, Laverne Vest ("Vest"), a Carter employee, was induced to mail a letter (Exhibit 2H) to Tiffany, providing the false confirmation. Tiffany presented that letter to Grant, falsely representing that the statements therein were true.

(i) **Sprout-Waldron (Koppers Co.)** On or about January 27, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, Sprout-Waldron in Muncy, Pennsylvania, and requested that Sprout-Waldron confirm that Tiffany Purchase Orders No. 439

(Exhibit 2I) and 440 (Exhibit 2J) had been received prior to June 30, 1977 and that Sprout-Waldron had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase order. In fact, Purchase Order Nos. 439 and 440 did not exist prior to June 30, 1977, and were not received by Sprout-Waldron until December of 1977. Sprout-Waldron refused to send such a false confirmation letter. Thereafter, Kahn, Martin or Cassel, or someone acting at Kahn's direction, created a forged confirmation letter (Exhibit 2K), which Kahn and Tiffany then presented to Grant.

(j) **Howe Richardson Scale Company ("Howe Richardson").** On or about February 20, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, the Howe Richardson Scale Company at Maryland Heights, Missouri, and requested that Howe Richardson confirm that Purchase Orders No. 447 (Exhibit 2L) and 483 (Exhibit 2M) had been received prior to June 30, 1977; and that Howe Richardson had been holding the equipment since shortly after receipt of the purchase order. In fact, neither purchase order existed prior to June 30, 1977; Purchase Order No. 447 (Exhibit 2L) was not received by Howe Richardson until on or about December 7, 1977, and Purchase Order No. 483 (Exhibit 2M) was not received by Howe Richardson until on or about March 13, 1978. Upon Howe Richardson's failure to send such a false confirmation, Kahn, Martin or Cassel, or someone acting at Kahn's direction, created a forged letter (Exhibit 2N), purportedly from Tom Shannon at Howe Richardson. Tiffany or Kahn then presented the forged false confirmation letter to Grant. On or about March 13, 1978, in response to Grant's request for "reconfirmation," Kahn or someone acting at his direction mailed a letter to Howe Richardson asking for reconfirmation of the above-described false statements. On March 15, 1978, Tom Shannon was induced to sign the Kahn letter (Exhibit 20), falsely confirming the misrepresentations. Howe Richardson then mailed the letter to Tiffany or to Grant.

(k) **Baldor-Baumann Company ("Baldor").** On or about February 8, 1978, acting at the direction of Tiffany and Kahn, defendant Leber telephoned, from Tiffany's offices in St. Louis, Missouri, the Baldor-Bauman Company at Chesterfield, Missouri, and requested that Baldor confirm that Purchase Order No. 449 (Exhibit 2P) had been received prior to June 30, 1977 and that Baldor had been holding the equipment awaiting shipping instructions since shortly after receipt of the purchase order. In fact, Purchase Order No. 449 did not exist prior to June 30, 1977, and was not received by Baldor until on or about December 8, 1977. Baldor, in response to Leber's request, was induced to mail a letter (Exhibit 2Q) signed by O. A. Baumann to Tiffany. Kahn, Martin or Cassel, or someone acting at Kahn's direction, used the letterhead and signature from that genuine letter (Exhibit 2Q), to create a forged letter (Exhibit 2R), falsely confirming receipt of the purchase order. Tiffany then presented the forgery to Grant.

(l) **Superior Equipment Mfg. Co. ("Superior").** Tiffany presented to Grant a letter (Exhibit 2S) confirming receipt of three purchase orders (Tiffany Purchase Orders Numbered 444 (Exhibit 2T), 445 (Exhibit 2U) and 446 (Exhibit 2V)). The letter was a forgery and falsely confirmed that Superior had received the purchase orders dated June 7, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase orders did not exist prior to June 30, 1977, and were not received by Superior until December of 1977. Kahn, Martin or Cassel, or someone acting at Kahn's direction, created the forged letter (Exhibit 2S) falsely confirming receipt of the purchase orders. Tiffany and Kahn then presented that letter to Grant, knowing it was forged and contained false information.

(m) **Ferrell-Ross.** Tiffany presented to Grant a letter (Exhibit 2W) confirming receipt of Tiffany Purchase Order No. 486 (Exhibit 2X). The letter was a forgery and falsely confirmed that Ferrell-Ross had received the purchase order dated June 8,

1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was not received by Ferrell-Ross until March of 1978. Kahn, Martin or Cassel, or someone acting at Kahn's direction created the forged letter (Exhibit 2W) falsely confirming receipt of the purchase order. Tiffany and Kahn then presented that letter to Grant, knowing it was forged and contained false information. On or about March 13, 1978, in response to Grant's request for "reconfirmation" Kahn, or someone acting at his direction, mailed a letter to Ferrell-Ross asking for reconfirmation of the above-described false statements. On March 17, 1978, a Ferrell-Ross employee was induced to sign the Kahn letter (Exhibit 2Y) again falsely confirming the misrepresentations, and mailed it to Tiffany or to Grant.

(n) **Seedburo Equipment Co. ("Seedburo").** Tiffany presented to Grant a letter (Exhibit 2Z) confirming receipt of two purchase orders (Tiffany Purchase Orders Numbered 487 (Exhibit 3A) and 493 (Exhibit 3B)). The letter was a forgery and falsely confirmed that Seedburo had received the purchase orders dated June 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase orders. In fact the purchase orders did not exist prior to June 30, 1977, and were not received by Seedburo until July of 1978, when Seedburo requested copies of them in connection with the investigation surrounding Tiffany. Kahn, Martin or Cassel, or someone acting at Kahn's direction, created the forged letter (Exhibit 2Z), purportedly from Jack T. Snader at Seedburo. Tiffany or Kahn then presented the forged false confirmation letter to Grant.

(o) **Gustafson Mfg. Co. ("Gustafson").** Tiffany presented to Grant a letter (Exhibit 3C) confirming receipt of Tiffany Purchase Order No. 489 (Exhibit 3D). The letter was a forgery and falsely confirmed that Gustafson had received the purchase order dated June 10, 1977, and had been holding the equipment

awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was not received by Gustafson until March 13, 1978. Kahn, Martin or Cassel, or someone acting at Kahn's direction created the forged letter (Exhibit 3C), purportedly from Gene T. Billmyre at Gustafson. Tiffany or Kahn then presented the forged false confirmation letter to Grant. On or about March 13, 1978, in response to Grant's request for "reconfirmation," Kahn or someone acting at his direction mailed a letter to Gustafson asking for reconfirmation of the above-described false statements. On March 15, 1978, Gene T. Billmyre was induced to sign the Kahn letter (Exhibit 3E) falsely confirming the misrepresentations, and mailed it to Tiffany or to Grant.

(p) **Hagan Mfg. Co. ("Hagan").** Tiffany presented to Grant a letter (Exhibit 3F) confirming receipt of Tiffany Purchase Order No. 490 (Exhibit 3G). The letter was a forgery and falsely confirmed that Hagan had received the purchase order dated June 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was not received by Hagan until December of 1977. Kahn, Martin or Cassel, or someone acting at Kahn's direction created the forged letter (Exhibit 3F), purportedly from Pete Brunson at Hagan. Tiffany or Kahn then presented the forged false confirmation letter to Grant.

(q) **Merritt Roaster Corp. ("Merritt").** Tiffany presented to Grant a letter (Exhibit 3H) confirming receipt of Tiffany Purchase Order No. 492 (Exhibit 3I). The letter was a forgery and falsely confirmed that Merritt had received the purchase order dated June 8, 1977, and had been holding the equipment awaiting shipment orders since shortly after receipt of the purchase order. In fact, the purchase order did not exist prior to June 30, 1977, and was never received by Merritt. Kahn, Martin or Cassel, or someone acting at Kahn's direction, created the

forged letter (Exhibit 3H), purportedly from Alice Goede at Merritt. Tiffany or Kahn then presented the forged false confirmation letter to Grant.

(r) Having devised the scheme or artifice to defraud Grant and in order to execute or attempt to execute that scheme or artifice, the following acts (more specifically described above) were violations of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud), which were parts of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c):

(i) On or about the dates listed below defendants transmitted in interstate commerce by means of wire communications certain signs, signals and sounds (that is, the following described telephone calls made from St. Louis, Missouri) in violation of 18 U.S.C. § 1343 (wire fraud):

Date Of Telephone Calls	**Supplier (Person Called)**	**Location Called**
1/27/78	Burdick	Decatur, Illinois
1/27/78	Hunter	Mackinaw, Illinois
1/27/78	Universal	Waterloo, Illinois

Date Of Telephone Calls	**Supplier (Person Called)**	**Location Called**
1/27/78	Carter	N.E. Minneapolis, Minnesota
1/27/78	Sprout-Waldron	Muncey, Pennsylvania

(ii) On or about the dates listed below, defendants placed in a post office or other authorized depository for mail the following described letters and purchase orders to be delivered by the U.S. Postal Service, in violation of 18 U.S.C. § 1341 (mail fraud):

MAILED

Date	Addressee (Supplier)	Exhibit No.
12/77	Essmueller	C
12/12/77	Burdick	G
3/13/78	Burdick	I
12/7/77	Hunter	J
12/7/77	Hunter	K, L, M & N
3/13/78	Hunter	Q
12/7/77	Universal	R
3/13/78	Universal	S, T, U & X
12/77	Garner	Z
12/77	Energy	2B
12/77	Forsbergs	2E
12/77	Carter	2G
12/6/77	Sprout-Waldron	2I
12/8/77	Sprout-Waldron	2J
12/7/77	Howe Richardson	2L
3/13/78	Howe Richardson	2M & 2O
12/8/77	Baldor	2P
12/77	Superior	2T, 2U & 2V
3/13/78	Ferrell-Ross	2X & 2Y
3/13/78	Gustafson	3D & 3E
12/77	Hagan	3G

(iii) On or about the dates listed below, defendants caused the above-described letters to be delivered to Tiffany's offices by mail from the following suppliers, in violation of 18 U.S.C. § 1341 (mail fraud):

CAUSED TO BE MAILED

Date	Sender (Supplier)	Exhibit No.
1/27/78	Essmueller	F
1/27/78	Burdick	H
3/15/78	Burdick	I
1/27/78	Hunter	O
2/20/78	Hunter	P
3/14/78	Hunter	Q
1/27/78	Universal	V
2/17/78	Universal	W
3/22/78	Universal	X
2/8/78	Energy	2C
2/8/78	Forsbergs	2F
1/27/78	Carter	2H
3/15/78	Howe Richardson	2O
2/8/78	Baldor	2Q
3/17/78	Ferrell-Ross	2Y
3/13/78	Gustafson	3E

25.(a) In early 1978, Grant raised the question whether the Government of Nigeria (the alleged purchaser, sometimes referred to as the "Bendel Food Production Board") had made arrangements to provide Tiffany sufficient assurance that amounts due Tiffany under the purported Nigerian contract (described in paragraph 18) would be paid. Defendant Kahn and other Tiffany officers and employees represented to Grant that "financing" had been arranged, and that a consortium of banks in Nigeria had made commitments to loan the Purchaser

sufficient funds to make full payment to Tiffany for products sold under the Nigerian contract. As purported proof of said financing commitments, defendant Kahn, acting in behalf of defendant Tiffany, delivered to Grant the following documents (marked as follows and incorporated herein):

Exh. 3J: Letter dated 3/9/78 to Tiffany from W.J. Anukpe, Chairman/Managing Director, New Nigeria Bank Ltd. (the "Anukpe letter").

Exh. 3K: Letter dated 3/20/78 to Tiffany, from M. Insole, Principal Manager, Standard Bank Nigeria Limited (the "Insole letter").

Exh. 3L: Letter dated 3/17/78 to Tiffany from W. D. Keatinge, Ag. Assistant General Manager, Barclay's Bank of Nigeria, Limited (the "Keatinge letter").

Exh. 3M: Telex dated 3/20/78 to Tiffany from H. C. Arnold, Director, Standard Bank Nigeria Limited (the "Arnold telex").

Defendant Kahn represented to Grant that Tiffany had received Exhibits 3J, 3K, 3L and 3M from the Nigerian banks designated in said exhibits, and further represented that by virtue of said letters, telexes, and other assurances given Kahn by the banks and by the Purchaser, payment in full under the Nigerian contract was assured.

(b) The representations made by defendant Kahn and by other Tiffany employees as described in subparagraph (a) were false and fraudulent and known to be so when made. Upon information and belief, Simpkins knew that Tiffany had not received sufficient assurances from the Nigerian banks, and he knew that other Tiffany personnel were falsely representing to Grant that sufficient assurances had been obtained. Simpkins failed to disclose this information to Grant.

(c) Exhibits 3J, 3K, 3L and 3M listed above are forgeries and contain false information. In fact, Kahn, Appel, Martin or Cassel, or someone acting at their direction, created Exhibits 3J, 3K, 3L and 3M. More specifically:

(i) The Anukpe letter, Exh. 3J, is a forgery, the purported signature having been forged by defendant Kahn, Martin or Cassel, or some other Tiffany officer or employee acting in Tiffany's behalf. Although represented as having been typed and prepared in Nigeria, Exhibit S was in fact typed at Tiffany's offices in St. Louis County, Missouri by Kahn, Martin or Cassel, or some other Tiffany officer or employee acting in Tiffany's behalf.

(ii) The Insole letter, Exh. 3K, although represented as having been typed and prepared in Nigeria, was in fact typed at Tiffany's offices on the same Tiffany typewriter used to type the forged Anukpe letter, and is a forgery.

(iii) Upon information and belief, Grant alleges that the Keatinge letter, Exhibit 3L, is a forgery.

(iv) The Arnold telex, Exh. 3M, was not in fact sent by Arnold, and is a forgery.

(d) Upon information and belief, Grant further alleges:

(i) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, placed (or caused to be placed) in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Postal Service, each of the three fictitious, spurious and fraudulent letters described above (Exhibits 3J, 3K and 3L) in violation of 18 U.S.C. §1341.

(ii) At various times (the specific instances presently unknown to Grant), officers and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and fraudulent representations (as heretofore described) and for the purpose of executing such scheme or artifice, transmitted or caused to be transmitted in interstate or foreign commerce, by means of wire communications, certain writings, signs, signals and sounds, specifically, telephone and telex communications of the contents or substance of the contents of Exhibits 3J, 3K, 3L and 3M, in violation of 18 U.S.C. § 1343 (wire fraud).

(iii) The violations of 18 U.S.C. §§ 1341 and 1343 described above were parts of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c). The forgeries and illegal uses of the mails and wire communications and the conduct of Tiffany's affairs through that pattern of racketeering activity was directed at Grant with the intent of deceiving Grant to its detriment.

26. In a false and fraudulent attempt to pressure Grant into certifying the Nigerian transaction as a sale, Tiffany engaged the services of four independent public accounting firms and furnished to said firms the fictitious, spurious and fraudulent documents (Exhs. 3J, 3K, 3L and 3M) and other false, misleading and fraudulent materials. Tiffany intended, by such fraudulent actions, to persuade said accounting firms to render opinions to the effect that the Nigerian sale should be recognized, and thus to coerce Grant to render such opinion. Based upon the false representations made to said firms, they did indeed render such opinions. Upon information and belief, Grant further alleges that at various times (the specific instances presently unknown to Grant), officers, directors and employees of Tiffany, or others acting in Tiffany's behalf, having devised a scheme or artifice to defraud Grant by means of false and

fraudulent representations (as heretofore alleged), and for the purpose of executing such scheme or artifice, placed or caused to be placed in a post office or authorized depository for mail matter, to be sent or delivered by the U.S. Post Office Department, and transmitted by wire or telex in interstate or foreign commerce, false and fraudulent communications to said accounting firms and to others, in violation of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). These mail fraud and wire fraud violations were part of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c) for the purpose of deceiving and injuring Grant.

(ii) **Steelabrade.**

27. Having devised the scheme or artifice to defraud Grant as heretofore alleged, defendants further conducted or participated, directly or indirectly, in the conduct of the enterprises' affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), in the following particulars:

(a) In late February or early March, 1978, defendant Kahn, in furtherance of said scheme to defraud Grant, called (on the telephone) one James V. Murphy ("Murphy"), who was President of Steelabrade Corporation ("Steelabrade"), a supplier of products to Tiffany. Kahn, with full knowledge that as of December 31, 1977, and early March, 1978, Steelabrade held no Tiffany "inventory" in its possession, nevertheless fraudlently and willfully attempted to induce Murphy to represent to Grant that Steelabrade did, in fact, have in its possession as of December 31, 1977 and early March, 1978 certain inventory purportedly the property of Tiffany. Murphy refused Kahn's fraudulent request, whereupon Kahn directed Murphy to prepare and deliver to Kahn a schedule of all purchases during 1977 of Steelabrade products by Tiffany. Murphy complied.

(b) Kahn falsely and fraudulently represented to Grant that Steelabrade held in its possession (as of December 31, 1977 and

early March, 1978) approximately $500,000 in "inventory" (products sold by Steelabrade to Tiffany and other products, all of which were purportedly held in Steelabrade's possession). Kahn, in furtherance of the above-described scheme or artifice to defraud and in violation of 18 U.S.C. § 1341, caused Grant (who relied on Kahn's fraudulent misrepresentations) to place in a post office or authorized depository for mail, to be sent or delivered by the U.S. Post Office Department, a confirmation request, (Exhibit 3N) that is, a written request that Steelabrade confirm to Grant that Steelabrade did, in fact, have in its possession said inventory.

(c) On or about March 8, 1978, Kahn, Cassel or Martin, or someone acting at Kahn's direction, prepared a schedule showing sales by Steelabrade to Tiffany during 1977 and additional products. The total of said sales and other property was valued at approximately $500,000. To the schedule defendants attached a confirmation request. Defendants Kahn, Cassel or Martin, or someone acting at Kahn's direction, signed the name "James V. Murphy" (President of Steelabrade) to said document and dated the same. Said signature was made without the knowledge, consent or authorization of Murphy, and is a forgery. Further, defendants Kahn, Cassel or Martin, or someone acting at Kahn's direction, inserted the following typed language in the confirmation request (Exhibit 30):

> Attached please find a list of materials that was either purchased from us going back to 1976 or was delivered to our facility for processing during 1977. This inventory was at our premises at December 31, 1977 and March 1, 1978."

The insertion of said language was done without the knowledge, consent or authorization of Murphy, and is a false statement.

(d) Defendants Kahn, Cassel and Martin committed the acts herein alleged as part of a scheme to defraud Grant, in that Defendants by means of false representations and forgery, intended to deceive Grant into believing that Tiffany owned some

$500,000 in inventory in the possession of Steelabrade. Defendants further attempted to deceive Grant into making a certified audit which would reflect ownership by Tiffany of said inventory. Such certification would have materially increased Tiffany's earnings (or decreased its losses) for 1977, and would have distorted Tiffany's actual financial condition as of December 31, 1977.

(e) On or about March 8, 1978, defendants Kahn, Cassel or Martin, or someone acting at Kahn's direction, placed in a post office or authorized depository for mail, to be sent or delivered by the U.S. Post Office Department, the fictitious, fraudulent and forged confirmations (Exhibit 30), addressed to Grant at its offices in Clayton, Missouri and to Murphy at Steelabrade's offices in St. Louis County, Missouri, in violation of 18 U.S.C. § 1341. Said violations of 18 U.S.C. § 1341 were part of a pattern of racketeering activity through which the enterprises' affairs were conducted in violation of 18 U.S.C. § 1962(c).

(iii) **Farm Store Inventories.**

28. Beginning in late December of 1977, in preparation for and as a part of the 1977 audit to be conducted by Grant, Tiffany counted its inventories at its various facilities. Grant, as part of its audit, reviewed the inventories prepared by Tiffany. Tiffany, in order to conceal its true financial condition, and to deceive Grant into unknowingly assisting it in presenting false and misleading financial statements, represented to Grant that the inventories as originally taken at Tiffany's farm stores were inaccurate and should be adjusted upward. Specifically, Tiffany represented that Tiffany's farm stores each held additional inventory that had not been counted originally, and which should be added to the original inventory figures. In fact, the farm stores held no additional inventory. Defendants Tiffany, Kahn, Leber and Appel, or other Tiffany officers or employees working at their direction, knew at the time that the representations concerning additional inventory were false. Tiffany, Kahn, Ap-

pel and Leber made the misrepresentations to Grant pursuant to Tiffany's scheme or artifice to defraud Grant as described above, and in an attempt to induce Grant to accept the existence of the additional inventory and allow Tiffany to reflect that inventory on its financial statements, thus overstating its income and net worth.

(a) In February or March of 1978, defendant Kahn, in furtherance of the scheme to defraud Grant, telephoned from the Tiffany offices in St. Louis, Missouri, the managers of Tiffany's farm stores in Oelwein, Iowa, Sullivan, Illinois, Arcanum, Ohio and Macon, Mississippi, in violation of 18 U.S.C. § 1343, asking that they report to Grant that they were in possession of Tiffany inventory that, in fact, did not exist.

(b) In response to Kahn's fraudulent telephone request described in subparagraph (a) above, Robert E. Richner ("Richner"), Manager of the Trulock farm store in Macon, Mississippi, mailed to Tiffany a letter dated March 30, 1978 (Exhibit 3P) stating that Trulock possessed certain Tiffany inventory. In fact, the representations made in the letter were false and known by Richner to be false. Tiffany and Kahn, for the purpose of executing that scheme or artifice, caused the Richner letter to be delivered by mail to Tiffany on or about March 30, 1978 in violation of 18 U.S.C. § 1341. Tiffany then presented that letter to Grant.

(c) In response to Kahn's fraudulent telephone request described in subparagraph (a) above, Donald D. Myott ("Myott"), Manager of the Trulock American Farm Store in Oelwein, Iowa, mailed to Tiffany an undated, handwritten list (Exhibit 3Q) of Tiffany inventory which Trulock purportedly possessed. In fact, the representations made in the list were false and known by Myott to be false when made. Tiffany and Kahn caused the Myott letter to be delivered by mail to Tiffany in March of 1978 in violation of 18 U.S.C. § 1341. Tiffany then presented that letter to Grant.

(d) Tiffany represented to Grant that the reason the inventory had not been reported from all of the farm stores was that Tiffany was negotiating with the farm stores concerning the possibility of the managers' purchasing those stores from Tiffany. To support this representation Kahn solicited "letters of intent" from the farm store managers. Kahn, or someone acting at his direction, prepared a form letter which was mailed to each of the farm store managers for signature (Exhibits 3R, 3S, 3T and 3U). The letters stated that the manager intended to purchase the particular farm store that he operated and listed items to be purchased. The managers were induced to sign these "letters of intent" and to mail them back to Tiffany in violation of 18 U.S.C. § 1341. The information stated in the letters did not accurately reflect the status of the negotiations at the dates of the letters.

(e) The above-described violations of 18 U.S.C. §§ 1341 and 1343 were part of a pattern of racketeering activity through which defendants conducted the affairs of the enterprises in violation of 18 U.S.C. § 1962(c) in an attempt to deceive and defraud Grant allowing Tiffany to reflect that inventory on its financial statements.

(iv) Press Releases, SEC Filings, and Reports to Shareholders.

29. Defendants, pursuant to the scheme or artifice to defraud Grant and others and knowing that Tiffany's financial position during the year 1977 was unsound, sought to conceal its true financial condition from its creditors, shareholders and the investing public. As a part of the scheme or artifice to deceive, Tiffany issued and filed certain false and misleading Quarterly Reports on Form 10-Q, and distributed false and misleading statements in Quarterly Reports to Shareholders and Press Releases. These misleading documents, described more particularly below, were provided to Grant and disseminated to the SEC, shareholders and investing public through the mails. The various SEC filings, shareholder reports and press releases were

based on financial statements which were not audited by Grant or reviewed prior to filing or mailing. Instead, Tiffany provided Grant with copies of the documents after they had been disseminated to others. Tiffany falsely represented to Grant that the information contained in the documents was a true and accurate description of Tiffany's financial condition. In fact, the documents were false and misleading and were given to Grant to deceive Grant and to induce Grant to aid and abet Tiffany in promulgating a false picture of its financial condition. Tiffany intended that Grant rely on the false information provided when Grant audited Tiffany's 1977 financial statements. In fact, Grant was induced to rely on such false and misleading information and would not have, had it known of the fraud, continued to agree to conduct the audit of Tiffany's 1977 financial statements or render any accounting services to Tiffany.

The above-described statements were created, reviewed and/or signed by Kahn and Simpkins, with knowledge that they contained false and misleading information, or with knowledge that matters were omitted which were necessary to make the statements not misleading. The use of the mails, described in detail hereafter, in disseminating these materials violated 18 U.S.C. § 1341.

(a) On or about August 12, 1977, Tiffany filed a Quarterly Report on Form 10-Q with the Securities and Exchange Commission covering the three-month and six-month periods ended June 30, 1977 ("June 1977 10-Q") (Exhibit 3V). Tiffany, Kahn, Simpkins and Appel created, reviewed or participated in the filing. The June 1977 10-Q was materially false and misleading in that, *inter alia,* it materially overstated Tiffany's sales, net earnings, accounts receivable, shareholders' equity and working capital, and in that it omitted to disclose that a condition of default existed under the terms of certain financing agreements, and in that it failed to disclose that substantial losses were expected for the year 1977. The above representations and omissions were material and false, and known to be so at the time

they were made. Upon information and belief, Tiffany filed the June 1977 10-Q with the SEC by use of the United States mails. Tiffany presented to Grant a copy of the June 1977 10-Q, falsely representing to Grant that it reflected a true and accurate statement of Tiffany's financial condition.

(b) In August of 1977 Tiffany mailed to its shareholders a report entitled "Tiffany Industries, Inc., Second Quarter reports to Shareholders" ("1977 Second Quarter Report"), signed by Kahn and Simpkins (Exhibit 3W). Tiffany provided to Grant a copy of that report, intending that Grant rely on the false statements contained therein. Kahn or Simpkins prepared or reviewed the report. It contained many of the material misrepresentations contained in the June 1977 10-Q. It represented that Tiffany's sales for the second quarter of 1977 were higher than those for the second quarter of 1976. It represented that Tiffany's enterprises in Africa were becoming more substantial in both volume and scope. In fact, the representations were false and were known to be false when made. As of August 1977 Tiffany anticipated substantial losses for 1977, but the report failed to disclose such anticipation.

(c) In August of 1977, Tiffany issued a press release (Exhibit 3X) which summarized the 1977 Second Quarter Report to the shareholders. The press release was prepared or reviewed by Kahn, Simpkins or Appel, or other Tiffany officers or employees acting at their direction. The press release stated that Tiffany's sales for the second quarter of 1977 were higher than for the same period of 1976. That statement was false and known to be false when made. The press release failed to disclose that substantial losses were anticipated for 1977. A copy of the press release was given to Grant. Upon information and belief, Tiffany presented the press release, through use of the mails, to various members of the news media.

(d) On or about November 14, 1977, Tiffany filed a Quarterly Report on Form 10-Q with the Securities and Exchange Commission covering the three-month and nine-month periods end-

ed September 30, 1977 ("September 1977 10-Q") (Exhibit 3Y). Tiffany, Kahn, Simpkins and Appel created, reviewed or participated in the filing. The September 1977 10-Q was materially false and misleading because, *inter alia,* it materially overstated sales, net earnings, accounts receivable, shareholders' equity and working capital, it omitted to disclose that a condition of default existed under the terms of certain financing agreements, and it failed to disclose that substantial losses were expected for the year 1977. The above representations and omissions were material and false, and known to be so at the time they were made. Grant did not audit the financial statements on which the 10-Q was based. Upon information and belief, Tiffany filed the September 1977 10-Q by use of the mails. Tiffany provided a copy to Grant, representing to Grant that it reflected a true and accurate statement of Tiffany's financial condition. Said report was given to Grant with intent to induce Grant to rely on the false information therein, pursuant to the scheme or artifice to defraud Grant.

(e) In November of 1977 Tiffany mailed to its shareholders a report entited "Tiffany Industries, Inc., 1977 Third Quarter Report to Shareholders" ("1977 Third Quarter Report"), signed by Kahn and Simpkins (Exhibit 3Z). That report contained material misrepresentations and omitted disclosure of material information necessary to make the report not misleading. The 1977 Third Quarter Report contained many of the misstatements included in the September 1977 10-Q. Additionally, it represented that Tiffany had record high backlogs with reference to its export business, when in fact no significant backlogs existed. The 1977 Third Quarter Report stated that Tiffany "is on a course to one of its finest sales years" and that the outlook was for "earnings growth that is commensurate with these new sales plateaus." In fact, Tiffany's sales and earnings were not growing. Tiffany anticipated significant losses for the year 1977, but that fact was not disclosed in the 1977 Third Quarter Report. Tiffany, Kahn, Simpkins and Appel, or other Tiffany officers or employees acting at their direction, prepared

or reviewed the 1977 Third Quarter Report and knew that it contained false statements.

(f) In November of 1977, Tiffany issued a press release (Exhibit 4A) which summarized the 1977 Third Quarter Report to the shareholders. The press release was prepared or reviewed by Kahn, Simpkins or Appel, or other Tiffany officers or employees acting at their direction. The press release falsely stated that Tiffany's export activities had significant backlogs and that sales and earnings were growing, when in fact both statements were false. The press release failed to disclose that substantial losses were anticipated for 1977. A copy of the press release was given to Grant. Upon information and belief, Tiffany presented the press release, through use of the mails, to various members of the news media.

(g) The above described uses of the mails in violation of 18 U.S.C. § 1341 were part of a pattern of racketeering activity through which defendants conducted the enterprises' affairs in violation of 18 U.S.C. § 1962(c), for the purpose of deceiving and injuring Grant.

(v) Further Course of Conduct; Injury to Plaintiff.

The defendants' above described violations of 18 U.S.C. § 1962(c) were directed at Grant with the intent of injuring Grant and did injure Grant in its business and property in the following respects:

30. Throughout the course of the (uncompleted) audit by Grant of Tiffany's books and records for 1977, Tiffany officers, agents and employees (or others acting in Tiffany's behalf) impeded and obstructed the ordinary course of the audit and engaged in a conspiracy to conceal relevant facts from Grant and to defraud and mislead Grant. As the result of such conspiratorial and fraudulent conduct, the time required by Grant personnel to conduct the audit was substantially enlarged over the time which would have been required had Tiffany not

engaged in such conduct, thus increasing the amount of Grant's bill for its services. Tiffany was well aware that the charges by Grant to Tiffany for audit services would be based upon the time spent by Grant personnel. In further perpetration of this fraudulent and criminal conspiracy, Tiffany attempted to deceive Grant and to induce Grant to complete its audit and certify Tiffany's fraudulent transactions first by withholding payment; then, when the fraudulent and criminal conduct was disclosed, Tiffany sought to conceal said conduct by promising to pay Grant in full.

31. Had Grant been aware of the activities of defendants as above alleged, it would not have performed any accounting services for Tiffany in connection with the 1977 audit. As a result of the fraudulent conduct of defendants as described above, none of which was known or disclosed to Grant, the personnel of Grant continued to perform accounting services for defendant, all to Grant's injury to its business and property. Because Tiffany had no intention of paying Grant's bill for its services, the actions of defendants and Tiffany's other officers, agents and employees in impeding the audit as described above had the effect of increasing the ultimate damages suffered by Grant.

32. Through late April, 1978, defendants attempted to conceal (and are continuing to conceal) their fraudulent and unlawful acts. In late April, 1978 when Grant confirmed that defendants had used forged and fictitious documents in an attempt to defraud Grant and in a further attempt to publish misleading and fraudulent financial reports, Grant promptly advised Tiffany and its counsel that Grant would report its findings to the SEC as required by SEC Regulations. Following that report, the SEC commenced an intensive investigation of Tiffany which resulted in the SEC's suing Tiffany and others for injunctive relief. Following Grant's report to the SEC, Tiffany terminated Grant and refused to pay Grant for its services.

33. As the result of the SEC investigation, which was necessitated by and resulted directly from the unlawful and

fraudulent actions of defendants, Grant has incurred substantial expenses in excess of $250,000 in responding to SEC subpoenas and requests for documents, interviews, the giving of testimony, counsel fees related to same, and other related expenses.

34. At the time Grant's allegations were made public and the SEC commenced its investigation, Tiffany and Simpkins announced that the company would make a full internal investigation into the allegations, and that the results of that investigation would be made public. A "Special Inquiry Committee" was formed, consisting of one of Tiffany's outside directors and two independent persons. The Special Inquiry Committee investigated and provided a report to Tiffany's board. The report revealed massive fraud involving upper levels of Tiffany management. Tiffany did not make the report public as it had promised to do. Had Tiffany disclosed the report instead of further attempting to conceal the fraud, Grant's damages would have been mitigated, rather than increased as they were by the continued concealment. Defendants Tiffany and Simpkins have, from time to time after Grant's initial discovery of the fraud, issued public statements and press releases attempting to blame Grant for the fraud of Tiffany's management and indicating that Tiffany's problems do not involve violations of law but instead are little more than "disputes" with its former auditors. As a result of Tiffany's fraud, concealment of that fraud, and attempts to place public blame on Grant, Grant has been injured in its reputation as a national independent public accounting firm.

35. In furtherance of its fraudulent and unlawful actions, Tiffany (beginning in early May, 1978) promised to pay Grant all fees owed (totaling $258,000), whereas Tiffany intended not to pay Grant at all, but in induce Grant to limit its response to the SEC and to lend its reputation to representations made to the SEC by Defendants.

36. As the result of the foregoing, Grant has been damaged in the sum of $1,500,000.

WHEREFORE, plaintiff (Grant) prays for judgment on Count I against defendants in the sum of $1,500,000; further, in accord with 18 U.S.C. § 1964(c), that said award of damages be trebled, and that plaintiffs further recover the costs of this action and reasonable attorneys fees.

COUNT II

COMES NOW plaintiff Alexander Grant and Co., and for Count II of its claim against defendant Tiffany Industries, Inc., states:

1. Jurisdiction of Count II is founded on the doctrine of pendent jurisdiction, in that the claim on which Count II is based and the RICO claim on which Count I is based arose from the same transaction and from a common nucleus of operative fact.

2. Repeats and realleges the allegations of paragraphs 4 and 5 of Count I as this paragraph 2 of Count II.

3. Plaintiff Alexander Grant & Company was retained by defendant Tiffany Industries, Inc. to audit the financial statements of Tiffany Industries, Inc.

4. Plaintiff Alexander Grant & Company performed services for Tiffany Industries, Inc. in accordance with its retainer by Tiffany Industries, Inc. and in accordance with generally accepted auditing standards.

5. Tiffany Industries, Inc. owes Alexander Grant & Company $258,000.00 for its services rendered to Tiffany during 1977 and 1978.

6. The fees charged for said services were reasonable and proper at the time said services were performed.

7. Tiffany Industries, Inc. in early May, 1978 promised to pay Alexander Grant & Company all fees owed to Grant

($258,000.00). However, although subsequent demand has been made by Alexander Grant & Company, Tiffany has failed and refused, and continues to fail and refuse to pay any or all of the aforementioned amount, which is presently due and owing.

WHEREFORE, plaintiff Alexander Grant & Company prays judgment on this Court II of its claim against defendant Tiffany Industries, Inc. in the principal sum of $258,000.00, together with interest at the legal rate, and that Alexander Grant & Company further recover the costs of this action and a reasonable attorney's fee.

COUNT III

COMES NOW plaintiff Alexander Grant & Company ("Grant") and for Count III of its claim against defendant Tiffany Industries, Inc. ("Tiffany") states and alleges as follows:

1. Jurisdiction of Count III is founded on the doctrine of pendent jurisdiction, in that the claim on which Count III is based and the RICO claim on which Count I is based arose from the same transaction and from a common nucleus of operative facts.

2. Repeats and realleges the allegations of paragraphs 4 and 5 of Count I as this paragraph 2 of Count III.

3. From 1970 until the spring of 1978 Grant was retained by Tiffany as its outside auditor pursuant to the terms of written engagements.

4. At all relevant times, the activities of Tiffany were carried out by Tiffany's agents on behalf of Tiffany.

5. Sometime prior to June 30, 1977, the exact time of which is presently unknown to Alexander Grant & Company, Tiffany Industries, Inc., through its authorized agents, made and circulated to Alexander Grant & Company false, misleading and fraudulent information and documents, intending that Grant

accept such false, misleading and fraudulent information and permit Tiffany to include such information in Tiffany's financial statements.

6. In its efforts to seek to induce Grant's assistance as set forth in paragraph 5, Tiffany made the following misrepresentations described more fully in paragraphs 13 through 33 of Count I, which allegations are repeated herein as this paragraph 6 of Count III.

7. The foregoing representations and conduct were misrepresentations of material facts made and perpetuated by Tiffany with actual knowledge of their falsity, with the intent to deceive Alexander Grant & Company, and with the intent to induce Alexander Grant & Company to rely on said misrepresentations to its detriment.

8. As a direct and proximate result of said misrepresentations and conduct, Alexander Grant & Company has been damaged in reputation, business and property in the amount of $1,500,000.00.

9. The acts and conduct of Tiffany as described above were wanton, willful and malicious. An award of punitive damages is necessary and appropriate to punish Tiffany and to deter it from like conduct in the future.

WHEREFORE, Alexander Grant & Company prays judgment on this Count III of its claim against defendant Tiffany Industries, Inc. in the sum of $1,500,000; and that Alexander Grant & Company further recover the costs of this claim and reasonable attorneys' fee.

Respectfully submitted,

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Attorneys for Plaintiff

OF COUNSEL:

ARMSTRONG, TEASDALE,
KRAMER & VAUGHAN

Certificate of Mailing

I certify that I hand-delivered a copy of the foregoing First Amended Complaint to all counsel of record on this 19th day of August, 1982.

Catherine D. Perry